

413 F.3d 3, 60 ERC 1791, 367 U.S.App.D.C. 3, 35 Env'tl. L. Rep. 20,135  
(Cite as: 413 F.3d 3, 367 U.S.App.D.C. 3)

## H

United States Court of Appeals,  
District of Columbia Circuit.  
State of NEW YORK, et al., Petitioners  
v.

U.S. ENVIRONMENTAL PROTECTION AGENCY,  
Respondent  
NSR Manufacturers Roundtable, et al., Intervenors  
Nos. 02-1387, 03-1016, 03-1033, 03-1036, 03-1040, 03-1041, 03-1044 to 03-1052, 03-1054 to 03-1057, 03-1104, 03-1130, 03-1131, 03-1135, 03-1175 to 03-1178, 03-1437, 03-1448, 03-1457.

Argued Jan. 25, 2005.

Decided June 24, 2005.

Rehearing En Banc Denied Dec. 9, 2005.

**Background:** State governments, environmental organizations and industrial entities brought Petition for Review from final order of Environmental Protection Agency (EPA), challenging agency's rule interpreting **New Source Review** (NSR) permitting process for stationary sources under Clean Air Act (CAA).

**Holdings:** The Court of Appeals held that:

- (1) EPA did not unlawfully interpret prior statutory definitions and rules;
- (2) EPA properly adopted new methods for calculating baseline actual emissions;
- (3) new rule's demand growth exclusion was not improper;
- (4) EPA failed adequately to explain rationale for new recordkeeping and reporting requirements;
- (5) EPA's use of plantwide applicability limitations was not improper;
- (6) EPA lacked authority to exempt facilities with "clean unit" status or pollution control projects;
- (7) claims alleging weakening of state alternatives were not ripe for review; and
- (8) EPA provided adequate notice to states regarding mandatory package of program elements.

Petition granted in part and denied in part.

Williams, Circuit Judge, filed concurring opinion.

West Headnotes

[1] Environmental Law 149E ☞291

149E Environmental Law

149EVI Air Pollution

149Ek289 Administrative Agencies and Proceedings

149Ek291 k. Regulations and Rulemaking in General. Most Cited Cases

Definition of "modification" within Environmental Protection Agency (EPA) rule interpreting New Source Review (NSR) permitting process for stationary sources under Clean Air Act (CAA) did not unlawfully differ from term's prior definition for New Source Performance Standards (NSPS) purposes; although Congress used same language in both contexts, there were no indications in statutory language or history to support inference that Congress intended to incorporate preexisting regulatory definition into statute. Clean Air Act, §§ 111, 171, as amended, 42 U.S.C.A. §§ 7411, 7501; 40 C.F.R. §§ 52.21(b)(2)(ii), 60.14.

[2] Environmental Law 149E ☞662

149E Environmental Law

149EXIII Judicial Review or Intervention

149Ek662 k. Ripeness. Most Cited Cases

Claim that Environmental Protection Agency (EPA), in drafting preamble to rule interpreting New Source Review (NSR) permitting process for stationary sources under Clean Air Act (CAA), misconstrued earlier rule was not ripe for review, since disputed sentence was no more than short-hand reference to earlier rule, not formal interpretation. Clean Air Act, § 101 et seq., as amended, 42 U.S.C.A. § 7401 et seq.; 40 C.F.R. § 52.21.

[3] Federal Courts 170B ☞12.1

170B Federal Courts

170BI Jurisdiction and Powers in General

170BI(A) In General

170Bk12 Case or Controversy Requirement

170Bk12.1 k. In General. Most Cited Cases

Ripeness depends on: (1) fitness of issue for judicial review, and (2) hardship to parties of withholding judicial decision.

[4] Environmental Law 149E ☞268

149E Environmental Law

149EVI Air Pollution

149Ek266 Particular Sources of Pollution

413 F.3d 3, 60 ERC 1791, 367 U.S.App.D.C. 3, 35 Env'tl. L. Rep. 20,135  
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149Ek268 k. Stationary Sources in General.

Most Cited Cases

Environmental Protection Agency (EPA), in promulgating rule interpreting New Source Review (NSR) permitting process for stationary sources under Clean Air Act (CAA), did not act unlawfully in disallowing states' calculation of baseline emissions by using unit's source-specific allowable emissions as proxy for actual emissions, as provided in prior rule; EPA's rationale that baseline was intended to be indicator of emissions associated with utilization "actually achieved" was product of reasoned decision-making. Clean Air Act, § 103(a)(1), as amended, 42 U.S.C.A. § 7503(a)(1); 40 C.F.R. § 52.21(b).

[5] Statutes 361 ☞219(1)

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k213 Extrinsic Aids to Construction

361k219 Executive Construction

361k219(1) k. In General. **Most Cited**

Cases

Statutes 361 ☞219(2)

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k213 Extrinsic Aids to Construction

361k219 Executive Construction

361k219(2) k. Existence of Ambiguity.

Most Cited Cases

Court must defer to agency's interpretation of ambiguous statutory term if it represents reasonable accommodation of conflicting policies that were committed to agency's care by statute.

[6] Statutes 361 ☞219(1)

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k213 Extrinsic Aids to Construction

361k219 Executive Construction

361k219(1) k. In General. **Most Cited**

Cases

Statutes 361 ☞219(2)

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k213 Extrinsic Aids to Construction

361k219 Executive Construction

361k219(2) k. Existence of Ambiguity.

Most Cited Cases

Agency's interpretation of ambiguous statutory term is entitled to deference when regulatory scheme is technical and complex, agency considered matter in detailed and reasoned fashion, and decision involves reconciling conflicting policies.

[7] Environmental Law 149E ☞268

149E Environmental Law

149EVI Air Pollution

149Ek266 Particular Sources of Pollution

149Ek268 k. Stationary Sources in General.

Most Cited Cases

Environmental Protection Agency (EPA), in promulgating rule interpreting New Source Review (NSR) permitting process for stationary sources under Clean Air Act (CAA), did not act unlawfully in reinterpreting statutory term "increases" by adopting new method for calculating baseline actual emissions; ten-year "lookback" period provided for in new rule fulfilled statutory goal of balancing economic growth with need to protect air quality. Clean Air Act, § 111(a)(4), as amended, 42 U.S.C.A. § 7411(a)(4).

[8] Environmental Law 149E ☞268

149E Environmental Law

149EVI Air Pollution

149Ek266 Particular Sources of Pollution

149Ek268 k. Stationary Sources in General.

Most Cited Cases

Environmental Law 149E ☞683

149E Environmental Law

149EXIII Judicial Review or Intervention

149Ek677 Scope of Inquiry on Review of Administrative Decision

149Ek683 k. Air Pollution. **Most Cited Cases**

Environmental Protection Agency (EPA), in promulgating rule interpreting New Source Review (NSR) permitting process for stationary sources under Clean Air Act

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(CAA), was not arbitrary and capricious in selecting ten-year "lookback" period for calculating baseline actual emissions; although data was incomplete on prospective impacts of new methodology, EPA's predictive judgment was entitled to deference. Clean Air Act, §§ 111(a)(4), 307, as amended, 42 U.S.C.A. §§ 7411(a)(4), 7607.

[9] Administrative Law and Procedure 15A ⚡763

15A Administrative Law and Procedure

15AV Judicial Review of Administrative Decisions

15AV(D) Scope of Review in General

15Ak763 k. Arbitrary, Unreasonable or Capricious Action; Illegality. Most Cited Cases  
Incomplete data does not necessarily render agency decision arbitrary and capricious, since it is not infrequent that available data does not settle regulatory issue, and agency must then exercise its judgment in moving from facts and probabilities on record to policy conclusion.

[10] Administrative Law and Procedure 15A ⚡790

15A Administrative Law and Procedure

15AV Judicial Review of Administrative Decisions

15AV(E) Particular Questions, Review of

15Ak784 Fact Questions

15Ak790 k. **Rational Basis for Conclusions. Most Cited Cases**  
**Fact that evidence in agency's record may also support other conclusions does not prevent reviewing court from concluding that agency's decisions were rational and supported by record.**

[11] Environmental Law 149E ⚡268

149E Environmental Law

149EVI Air Pollution

149Ek266 Particular Sources of Pollution

149Ek268 k. Stationary Sources in General.  
Most Cited Cases

Environmental Law 149E ⚡293

149E Environmental Law

149EVI Air Pollution

149Ek289 Administrative Agencies and Proceedings

149Ek293 k. Hearing and Determination; Statement of Reasons. Most Cited Cases

Environmental Protection Agency (EPA), in promulgating rule interpreting New Source Review (NSR) permitting process for stationary sources under Clean Air Act (CAA), did not act unlawfully in providing for demand growth exclusion to post-change emissions calculation; notwithstanding inconsistent tentative conclusions, EPA adequately explained its reasons for extending exclusion to all industries, so long as growth was unrelated to change. Clean Air Act, § 101 et seq., as amended, 42 U.S.C.A. § 7401 et seq.; 40 C.F.R. § 52.21(b)(41)(ii)(c).

[12] Environmental Law 149E ⚡293

149E Environmental Law

149EVI Air Pollution

149Ek289 Administrative Agencies and Proceedings

149Ek293 k. Hearing and Determination; Statement of Reasons. Most Cited Cases

Environmental Law 149E ⚡301

149E Environmental Law

149EVI Air Pollution

149Ek298 Evidence

149Ek301 k. Weight and Sufficiency. Most Cited Cases

Environmental Protection Agency (EPA), in promulgating rule interpreting New Source Review (NSR) permitting process for stationary sources under Clean Air Act (CAA), failed adequately to explain how it could ensure NSR compliance without complete data pertaining to projected actual emissions from sources making physical or operational changes; there was insufficient evidence to support EPA's contention that new rule actually increased recordkeeping requirements for non-utilities. Clean Air Act, § 101 et seq., as amended, 42 U.S.C.A. § 7401 et seq.; 40 C.F.R. § 52.21(r)(6).

[13] Environmental Law 149E ⚡270

149E Environmental Law

149EVI Air Pollution

149Ek266 Particular Sources of Pollution

149Ek270 k. Manufacturing Facilities; Factories and Plants. Most Cited Cases

Environmental Protection Agency (EPA), in promulgating rule interpreting New Source Review (NSR) permitting process for stationary sources under Clean Air Act (CAA), was not arbitrary and capricious in providing for

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plantwide applicability limitations in assessing emissions increases, since agency had authority to define increases in terms of source-wide emissions. Clean Air Act, § 101 et seq., as amended, 42 U.S.C.A. § 7401 et seq.; 40 C.F.R. § 52.21(aa).

[14] Environmental Law 149E 268

149E Environmental Law

149EVI Air Pollution

149Ek266 Particular Sources of Pollution

149Ek268 k. Stationary Sources in General.

Most Cited Cases

Environmental Protection Agency (EPA), in promulgating rule interpreting New Source Review (NSR) permitting process for stationary sources under Clean Air Act (CAA), improperly provided for use of “clean unit” status as means of measuring emissions increases rather than actual emissions; plain language of CAA indicated that Congress intended to apply NSR to facility changes that increased actual emissions instead of potential or allowable emissions. Clean Air Act, § 111(a)(4), as amended, 42 U.S.C.A. § 7411(a)(4); 40 C.F.R. § 52.21(x).

[15] Statutes 361 206

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k204 Statute as a Whole, and Intrinsic Aids to Construction

361k206 k. Giving Effect to Entire Statute.

Most Cited Cases

Statute ought to be construed so that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.

[16] Statutes 361 195

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k187 Meaning of Language

361k195 k. Express Mention and Implied Exclusion. Most Cited Cases

**When Congress includes particular language in one section of statute but omits it in another section of same act, it is generally presumed that Congress acts intentionally and purposely in disparate inclusion or exclusion.**

[17] Environmental Law 149E 274

149E Environmental Law

149EVI Air Pollution

149Ek266 Particular Sources of Pollution

149Ek274 k. Exemptions, Extensions,

Exceptions, and Variances. Most Cited Cases

Environmental Protection Agency (EPA), in promulgating rule interpreting New Source Review (NSR) permitting process for stationary sources under Clean Air Act (CAA), lacked authority to exempt “environmentally beneficial” pollution control projects from NSR requirements by excluding them from definition of “modification”; nothing in statute or its legislative history suggested intent to authorize blanket exclusion for pollution control projects. Clean Air Act, § 101 et seq., as amended, 42 U.S.C.A. § 7401 et seq.; 40 C.F.R. § 52.21(b)(2)(iii)(h), (b)(32), (z).

[18] Environmental Law 149E 662

149E Environmental Law

149EXIII Judicial Review or Intervention

149Ek662 k. Ripeness. Most Cited Cases

Claim that Environmental Protection Agency (EPA), in promulgating rule interpreting New Source Review (NSR) permitting process for stationary sources under Clean Air Act (CAA), violated statutory provision preserving state authority to adopt more stringent pollution standards or limitations was not ripe for review, since potentially affected state governments offered no hypotheticals of new provisions that they might adopt. Clean Air Act, § 116, as amended, 42 U.S.C.A. § 7416; 40 C.F.R. § 51.166(a)(7)(iv).

[19] Environmental Law 149E 662


149E Environmental Law

149EXIII Judicial Review or Intervention

149Ek662 k. Ripeness. Most Cited Cases

Claim that Environmental Protection Agency (EPA), in promulgating rule interpreting New Source Review (NSR) permitting process for stationary sources under Clean Air Act (CAA), diminished likelihood of NSR qualification via purported “anti-backsliding” provisions for facilities was not ripe for review, since environmental effects of less sweeping review process were ambiguous. Clean Air Act, § 193, as amended, 42 U.S.C.A. § 7515.

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[20] Environmental Law 149E  292

149E Environmental Law

149EVI Air Pollution

149Ek289 Administrative Agencies and Proceedings

149Ek292 k. Notice and Comment. Most Cited Cases

Environmental Protection Agency (EPA), in promulgating rule interpreting New Source Review (NSR) permitting process for stationary sources under Clean Air Act (CAA), provided adequate notice to states regarding mandatory package of program elements rather than prospective "menu" of compliance alternatives, since agency's choice was logical outgrowth of its initial proposal. Clean Air Act, § 101 et seq., as amended, 42 U.S.C.A. § 7401 et seq.

West Codenotes

Held Invalid 40 C.F.R. § 52.21(b)(2)(iii)(h), (b)(32), (x, z).

\*7 On Petitions for Review of Final Action of the U.S. Environmental Protection Agency. F. William Brownell argued the cause for Industry Petitioners. With him on the briefs were Henry V. Nickel, Makram B. Jaber, David S. Harlow, William H. Lewis, Jr., Leslie Sue Ritts, and Lorane F. Hebert. David F. Zoll entered an appearance.

Michael J. Myers and J. Jared Snyder, Assistant Attorneys General, Attorney General's Office of the State of New York, argued the cause for Government Petitioners. With them on the briefs were Eliot Spitzer, Attorney General, Peter Lehner, Assistant Attorney General, Bill Lockyer, Attorney General, Attorney General's Office of the State of California, Matthew J. Goldman, Deputy Attorney General, Richard Blumenthal, Attorney General, Attorney General's Office of the State of Connecticut, Kimberly Massicotte and Matthew Levine, Assistant Attorneys General, M. Jane Brady, Attorney General, Attorney General's Office of the State of Delaware, Valerie S. Csizmadia, Deputy Attorney General, Lisa Madigan, Attorney General, Attorney General's Office of the State of Illinois, Thomas Davis, Assistant Attorney General, G. Steven Rowe, Attorney General, Attorney General's Office of the State of Maine, Gerald D. Reid, Assistant Attorney General, J. Joseph Curran, Jr., Attorney General, Attorney General's Office of the State of Maryland, Kathy M. Kinsey, Assistant Attorney General, Thomas F. Reilly, Attorney General, Attorney General's Office of the Commonwealth of Massachusetts, James R. Milkey and William L. Pardee, Assistant Attorneys General, Kelly A.

Ayotte, Attorney General, Attorney General's Office of the State of New Hampshire, Maureen D. Smith, Senior Assistant Attorney General, Peter C. Harvey, Attorney General, Attorney General's Office of the State of New Jersey, Kevin Auerbacher, Jean Reilly, and Ruth Carter, Deputy Attorneys General, Robert A. Reiley, Assistant Counsel, Attorney General's Office of the Commonwealth of Pennsylvania, Patrick C. Lynch, Attorney General, Attorney General's Office of the State of Rhode Island, Tricia K. Jedeke, Special Assistant Attorney General, William H. Sorrell, Attorney General, Attorney General's Office of the State of Vermont, Erick Titrud and Kevin O. Leske, Assistant Attorneys General, Peggy A. Lautenschlager, Attorney General, Attorney General's Office of the State of Wisconsin, Thomas L. Dosch, Assistant Attorney General, Robert J. Spagnoletti, Attorney General, Attorney General's Office of the District of Columbia, Edward E. Schwab, Deputy Attorney General, Donna M. Murasky, Senior Litigation Counsel, Stephen Shane Stark, William M. Dillon, Kathrine Currie Pittard, Robert N. Kwong, David Schott, Steven M. Basha, Leslyn Syren, Phillip M. Jay, Barbara Baird, Daniel C. Esty, Christopher P. McCormack, Christopher G. King, and Andrew Schwartz, Counsel. Kevin P. Maloney, John V. Dorsey, Sheldon Whitehouse, Lisa S. Gelb, and Michael H. Heneghan, Counsel, entered appearances.

Howard I. Fox argued the cause for Environmental Petitioners. With him on the briefs were Keri N. Powell, Ann B. Weeks, Jonathan F. Lewis, James R. May, \*8 Kenneth T. Kristl, John D. Walke, and David G. McIntosh. David G. Hawkins and James M. Stuhltrager entered appearances.

John F. Shepherd argued the cause for petitioner Newmont Mining Corporation. With him on the briefs were Denise W. Kennedy and Robert T. Connery.

Hope M. Babcock and William D. Evans, Senior Assistant County Attorney, were on the brief of amici curiae American Thoracic Society, et al., in support of Environmental Petitioners.

Lois Godfrey Wye, Norman L. Rave, Jr., and Angeline Purdy, Attorneys, U.S. Department of Justice, argued the cause for respondent. With them on the brief were John C. Cruden, Deputy Assistant Attorney General, and Monica Derbes Gibson, Counsel, U.S. Environmental Protection Agency.

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David Driesen and Christopher H. Schroeder were on the brief of amici curiae Clean Air Trust and Senators HillaryRodham Clinton, et al.

Leslie Sue Ritts, Lorane F. Hebert, William H. Lewis, Jr., Michael W. Steinberg, Henry V. Nickel, F. William Brownell, Makram B. Jaber, David S. Harlow, Russell S. Frye, John L. Wittenborn, Martha Elizabeth Cox, and Robert A. Messina were on the brief of Industry Intervenor. Michael A. McCord, Michael B. Barr, Charles H. Knauss, and Douglas S. Burdin entered appearances.

Keri N. Powell argued the cause for Environmental Intervenor. With her on the brief were Howard I. Fox, John D. Walke, David G. McIntosh, Ann B. Weeks, and Jonathan F. Lewis.

Jerry W. Kilgore, Attorney General, Attorney General's Office of the Commonwealth of Virginia, Roger L. Chaffe and Carl Josephson, Senior Assistant Attorneys General, Gregg D. Renkes, Attorney General, Attorney General's Office of the State of Alaska, Steve E. Mulder, Assistant Attorney General, Steve Carter, Attorney General, Attorney General's Office of the State of Indiana, Thomas M. Fisher, Special Counsel, Phill Kline, Attorney General, Attorney General's Office of the State of Kansas, David D. Davies, Deputy Attorney General, Wayne Stenchjem, Attorney General, Attorney General's Office of the State of North Dakota, Charles M. Carvell and Lyle G. Witham, Assistant Attorneys General, John Bruning, Attorney General, Attorney General's Office of the State of Nebraska, Jodi M. Fenner, Assistant Attorney General, Henry D. McMaster, Attorney General, Attorney General's Office of the State of South Carolina, J. Emory Smith, Jr., Assistant Deputy Attorney General, Lawrence E. Long, Attorney General, Attorney General's Office of the State of South Dakota, Roxanne Giedd, Deputy Attorney General, Mark L. Shurtleff, Attorney General, Attorney General's Office of the State of Utah, and Fred Nelson, Assistant Attorney General, were on the brief of Group I State Intervenor in support of respondent.

Peter C. Harvey, Attorney General, Attorney General's Office of the State of New Jersey, Kevin P. Auerbacher, Jean P. Reilly, and Ruth E. Carter, Deputy Attorneys General, Richard Blumenthal, Attorney General, Attorney General's Office of the State of Connecticut, Kimberly Massicotte and Matthew Levine, Assistant Attorneys

General, Bill Lockyer, Attorney General, Attorney General's Office of the State of California, Matthew J. Goldman, Deputy Attorney General, M. Jane Brady, Attorney General, Attorney General's Office of the State of Delaware, Valerie S. Csizmadia, Deputy Attorney General, Lisa Madigan, Attorney General, Attorney General's Office of the State of Illinois, Thomas Davis, Chief, J. Joseph Curran, Jr., \*9 Attorney General, Attorney General's Office of the State of Maryland, Kathy M. Kinsey, Assistant Attorney General, G. Steven Rowe, Attorney General, Attorney General's Office of the State of Maine, Gerald D. Reid, Assistant Attorney General, Thomas F. Reilly, Attorney General, Attorney General's Office of the Commonwealth of Massachusetts, James R. Milkey, William L. Pardee, and Frederick D. Augenstern, Assistant Attorneys General, Robert J. Spagnoletti, Attorney General, Attorney General's Office for the District of Columbia, Edward E. Schwab, Deputy Attorney General, Donna M. Murasky, Senior Litigation Counsel, Peggy A. Lautenschlager, Attorney General, Attorney General's Office of the State of Wisconsin, Thomas L. Dosch, Assistant Attorney General, William H. Sorrell, Attorney General, Attorney General's Office of the State of Vermont, Erick Titrud and Kevin O. Leske, Assistant Attorneys General, Eliot Spitzer, Attorney General, Attorney General's Office of the State of New York, Peter Lehner, J. Jared Snyder, and Michael J. Myers, Assistant Attorneys General, Robert A. Reiley, Assistant Counsel, Attorney General's Office of the Commonwealth of Pennsylvania, Kelly A. Ayotte, Attorney General, Attorney General's Office of the State of New Hampshire, Maureen D. Smith, Senior Assistant Attorney General, Patrick C. Lynch, Attorney General, Attorney General's Office of the State of Rhode Island, Tricia K. Jedele, Special Assistant Attorney General, Stephen Shane Stark, William M. Dillon, Kathrine Currie Pittard, David Schott, Steven M. Basha, Leslyn Syren, Robert N. Kwong, Barbara Baird, and Phillip M. Jay, were on the brief of Group II State and Local Government Intervenor in support of respondent.

Charlie Crist, Attorney General, Attorney General's Office of the State of Florida, and Jonathan A. Glogau, Assistant Attorney General, were on the brief of amicus curiae State of Florida supporting respondent.

C. Boyden Gray and Neil J. King were on the brief of amicus curiae Senator James M. Inhofe.

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\*10 Before: ROGERS and TATEL, Circuit Judges, and WILLIAMS, Senior Circuit Judge.

Opinion for the Court filed by Circuit Judge PER CURIAM.<sup>FN\*</sup>

FN\* Judge Rogers wrote Parts III, V-VII, and IX. Judge Tatel wrote Parts I and IV. Senior Judge Williams wrote Parts II and VIII.

Concurring opinion filed by Senior Circuit Judge WILLIAMS.

PER CURIAM.

**\*\*10** In 1977, Congress amended the Clean Air Act (“CAA” or “the Act”) to strengthen the safeguards that protect the nation's air quality. Among other things, these amendments directed that major stationary sources undertaking modifications must obtain preconstruction permits, as must major new sources, through a process known as “**New Source Review**” (“NSR”). According to a preexisting definition referenced in the 1977 amendments, a source undertakes a modification when “any physical change ... or change in the method of operation ... which increases the amount of any air pollutant emitted by such source” occurs. 42 U.S.C. § 7411(a)(4) (2000). The Environmental Protection Agency (“EPA”) has interpreted this rather terse definition in numerous rules, including ones issued in 1980, 1992, and most recently in 2002.

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Industry, government, and environmental petitioners now challenge this 2002 rule, which departs sharply from prior rules in several significant respects. Roughly speaking, industry petitioners argue that the 2002 rule interprets “modification” too broadly, while government and environmental petitioners argue that the rule’s interpretation is too narrow. Industry petitioners have also revived previously stayed challenges to EPA’s earlier rules.

Today, we reject challenges to substantial portions of the 2002 rule. Specifically, we find the following elements permissible interpretations of the CAA and not otherwise arbitrary and capricious: the use of past emissions and projected future actual emissions, rather than potential emissions, in measuring emissions increases; the use of a ten-year lookback period in selecting the two-year baseline period for measuring past actual emissions; the use of a five-year lookback period in certain circumstances; the abandonment of a provision authorizing states to use source-specific allowable emissions in measuring baseline emissions; the exclusion of increases due to unrelated demand growth from the measurement of projected future actual emissions; and the Plantwide Applicability Limitations (“PAL”) program. We also find meritless certain procedural challenges related to lack of notice.

We conclude, however, that two aspects of the 2002 rule rest on impermissible interpretations of the Act and a third is arbitrary and capricious. Specifically, EPA erred in promulgating the Clean Unit applicability test, which measures emissions increases by looking to whether “emissions limitations” have changed. Congress directed the agency to measure emissions increases in terms of changes in actual emissions. EPA also erred in exempting from NSR certain Pollution Control Projects (“PCPs”) that decrease **\*\*11 \*11** emissions of some pollutants but cause collateral increases of others. The statute authorizes no such exception. EPA acted arbitrarily and capriciously in determining that sources making changes need not keep records of their emissions if they see no reasonable possibility that these changes constitute modifications for NSR purposes. The agency failed to provide a reasoned explanation for how, absent such records, it can ensure compliance with NSR.

Finally, industry challenges to passages in the preambles to the 2002 and 1992 rules, as well as government challenges to the implementation of the 2002 rule, are unripe for review.

## I. Background

The 1977 CAA amendments define “modification” by reference to a statutory provision added in 1970. Seeking to understand what the 1977 Congress meant by modification—the central issue in this case—we thus begin with the 1970 CAA amendments and their implementing regulations.

Congress passed the 1970 amendments “to protect and enhance the quality of the Nation’s air resources so as to promote the public health and welfare and the productive capacity of its population.” 42 U.S.C. § 7401(b). The amendments set out a two-step process for achieving this goal: EPA first develops “National Ambient Air Quality Standards” (“NAAQS”) for various pollutants, and states then create and implement plans, known as “State Implementation Plans” (“SIPs”), to ensure their air meets these standards. *See id.* §§ 7409-7410.

The amendments also required new or modified sources to conform to emissions limits, known as “New Source Performance Standards” (“NSPS”), set by EPA. *See id.* § 7411. Because “[t]he Act contemplated” that these criteria would be “more stringent than those needed to meet ... NAAQS,” *Alabama Power Co. v. Costle*, 636 F.2d 323, 346 (D.C.Cir.1979), the meaning of “modified sources” took on particular significance: if an existing source made a “modification,” it needed to conform its change to NSPS, whereas an unmodified source only needed to meet whatever lesser requirements (if any) the SIP imposed for attaining NAAQS. Congress provided the following definition for “modification”:

any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted.

42 U.S.C. § 7411(a)(4). This definition requires *both* a change—whether physical or operational—and a resulting increase in emissions of a pollutant.

EPA’s 1975 NSPS regulation, like its earlier 1971 regulation, elaborated upon this statutory definition, doing so in provisions whose meaning the parties debate today. One part of the 1975 regulation provided that “‘[m]odification’ means any physical change in, or change

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in the method of operation of, an existing facility which increases the amount of any air pollutant (to which a standard applies) emitted into the atmosphere by that facility.” 40 Fed.Reg. 58,416, 58,418 (Dec. 16, 1975); *see also* 36 Fed.Reg. 24,876, 24,877 (Dec. 23, 1971). Using somewhat different terms, another part of the 1975 regulation stated that “any physical or operational change to an existing facility which results in an increase in the emission rate to the atmosphere of any pollutant to which a standard applies shall be considered a modification within the meaning ... of the Act,” with “[e]mission rate ... expressed as kg/hr of any pollutant discharged into \*12 \*12 the atmosphere.” 40 Fed.Reg. at 58,419. Yet neither the 1975 regulation nor its preamble explained why EPA found it necessary to offer these two separate glosses on “modification.”

Adding to the confusion, EPA put forth yet another definition of “modification” in a 1974 regulation implementing what became known as the regulatory “Prevention of Significant Deterioration” (“PSD”) program. Seeking to prevent backsliding in regions whose air quality met NAAQS, this program required new sources and sources undertaking modifications to obtain preconstruction permits. *See Alabama Power*, 636 F.2d at 346-49 (describing the regulatory PSD program). The regulation defined “modification” in a manner that closely tracked-but didn't precisely mirror-the NSPS regulatory definition, stating that “[t]he phrases ‘modification’ or ‘modified source’ mean any physical change in, or change in the method of operation of, a stationary source which increases the emission rate of any pollutant for which a national standard has been promulgated.” 39 Fed.Reg. 42,510, 42,514 (Dec. 5, 1974). The regulation's preamble further provided that the term “modified source” was meant “to be consistent with the definition used in [NSPS].” *Id.* at 42,513.

Both the NSPS and PSD regulations listed certain exceptions to what constitutes a “modification,” though once again the precise content of the regulations varied. The 1974 PSD and the 1971 NSPS regulations provided that:

(1) Routine maintenance, repair, and replacement shall not be considered a physical change, and (2) The following shall not be considered a change in the method of operation: (i) An increase in the production rate, if such increase does not exceed the operating design capacity of the source; (ii) An increase in the

hours of operation; (iii) Use of an alternative fuel or raw material [under certain conditions].

*Id.* at 42,514; *accord* 36 Fed.Reg. at 24,877. The 1975 NSPS regulation not only phrased its exceptions differently, but also added a few additional ones:

The following shall not, by themselves, be considered modifications under this part: (1) Maintenance, repair, and replacement which the Administrator determines to be routine ...; (2) An increase in production rate of an existing facility, if that increase can be accomplished without a capital expenditure on the stationary source containing that facility; (3) An increase in the hours of operation; (4) Use of an alternative fuel or raw material [under certain conditions] ...; (5) The addition or use of any system whose primary function is the reduction of air pollutants ...; (6) The relocation or change in ownership of an existing facility.

40 Fed.Reg. at 58,419-20.

In its various permutations, this regulatory framework had not been long in place when, in 1977, Congress amended the CAA yet again. These amendments drew upon, expanded, and superceded the regulatory PSD program. In particular, the amendments strengthened the Act by (1) expressly creating a preconstruction review process for new or modified major sources located in “nonattainment” areas (i.e., areas which failed to meet NAAQS), *see generally* 42 U.S.C. §§ 7501-7515; and (2) expressly providing a parallel preconstruction review process in PSD areas (i.e., areas which met NAAQS or where there was insufficient information to evaluate whether NAAQS were met), *see generally id.* §§ 7470-7492. The parties refer to the first as “Nonattainment New Source Review” (“NNSR”), to the second as “Prevention of Significant Deterioration” \*13 \*13 (“PSD”), and to both collectively as “New Source Review” (“NSR”). We shall do the same.

Under the amendments, sources seeking NNSR permits must meet stricter requirements than sources seeking PSD permits. Most notably, for NNSR permits, sources must achieve the “lowest achievable emission rate” (“LAER”) for new or modified units, whereas sources seeking PSD permits need only use the less demanding “best available control technology” (“BACT”). At a minimum, LAER and BACT are as restrictive as NSPS. *Id.* § 7479(3) (“In no event shall application of [BACT] result in emissions of any pollutants which will exceed the emissions allowed

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by any applicable standard established pursuant to” NSPS); accord *id.* § 7501(3) (for LAER). In certain circumstances, however, BACT and LAER can be more stringent than NSPS. See *id.* § 7479. Moreover, to obtain NNSR permits, sources must arrange for emissions reductions at other sources such that the modifications produce no increase in overall regional emissions. *Id.* § 7503. Sources must also demonstrate that any other sources owned by the same company comply with CAA requirements. *Id.* To obtain PSD permits, sources must undergo ambient air quality analyses to show that they will neither violate NAAQS increments nor adversely affect air quality in national parks or other areas that EPA has designated as needing particularly high-quality air. *Id.* § 7475.

Congress meant NSR to apply to both new *and modified* sources. Due to a technical defect, however, Congress initially achieved this goal only in the NNSR portion of the amendments, which defined modification by reference to the NSPS definition: “The terms ‘modifications’ and ‘modified’ mean the same as the term ‘modification’ as used in section 7411(a)(4) of this title.” *Id.* § 7501(4). By contrast, the PSD portion of the amendments applied initially to new sources only. Congress corrected this in a technical amendment passed several months later, which applied the PSD program to sources that were to undergo modifications “as defined in section 7411(a) of this title.” Pub.L. No. 95-190, § 14(a)(54), 91 Stat. 1393, 1402 (1977) (codified at 42 U.S.C. § 7479(2)(C)). As the legislative history explains, this “technical and conforming” amendment “[i]mplements conference agreement to cover ‘modification’ ... [in] conform[ance with] usage in other parts of the Act.” 123 CONG. REC. 36,250, 36,253 (Nov. 1, 1977).

In sum, the 1977 amendments carved out a significant difference between existing sources on the one hand and new or modified sources on the other. The former faced no NSR obligations—in the common phrase, they were “grandfathered”—while the latter were subject to strict standards. Limiting NSR to new or modified sources was one method of accomplishing the amendments’ goal of “a proper balance between environmental controls and economic growth,” *id.* at 27,076 (Aug. 04, 1977) (statement of Rep. Waxman) (quoted in *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 852 n. 25, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984)).

EPA promulgated an NSR regulation in 1978. (Although at this time and later ones, EPA issued multiple sets of

regulations—those applying to PSD in states without approved SIPs, those applying to NNSR in states without approved SIPs, those applying to PSD in states with approved SIPs, and those applying to NNSR in states with approved SIPs—these sets are sufficiently similar that for simplicity we typically reference the first of these as a shorthand for them all.) The 1978 regulation defined a major “modification” as a **\*\*14 \*14** “physical change, change in the method of operation of, or addition to a stationary source which increases the potential emission rate of any air pollutant regulated under the act.” 43 Fed.Reg. 26,380, 26,403-04 (June 19, 1978). The phrase “potential emission rate,” though new to EPA regulations relating to “modification,” went unchallenged during ensuing litigation over other aspects of the 1978 regulation. That litigation culminated in this circuit’s *Alabama Power Co. v. Costle* decision, issued initially as a brief opinion, 606 F.2d 1068 (D.C.Cir.1979), that was superseded six months later by a much longer one, 636 F.2d 323 (D.C.Cir. 1979).

In the period between the two *Alabama Power* opinions, EPA proposed a new NSR regulation. The proposed definition of modification continued focusing on potential emissions rates rather than actual emissions. 44 Fed.Reg. 51,924, 51,952 (Sept. 5, 1979). After the issuance of the revised *Alabama Power* opinion, however, EPA changed its definition of modification. The final 1980 rule defined the term as follows: “‘[m]ajor modification’ means any physical change in or change in the method of operation of a major stationary source that would result in a *significant net emissions increase* of any pollutant subject to regulation under the Act.” 45 Fed.Reg. 52,676, 52,735 (Aug. 7, 1980) (emphasis added). The regulation defined “[n]et emissions increase” as “any increase in actual emissions from a particular physical change or change in method of operation” that occurred after taking into account, through a process known as “netting,” “any other increases and decreases in actual emissions at the source that are contemporaneous with the particular change and are otherwise creditable.” *Id.* at 52,736. The regulation then defined “actual emissions” as follows:

(ii) In general, actual emissions as of a particular date shall equal the average rate, in tons per year, at which the unit actually emitted the pollutant during a two-year period which proceeds the particular date and which is representative of normal source operation. The Administrator shall allow the use of a different time period upon a determination that it is more representative of normal source operation. Actual

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emissions shall be calculated using the unit's actual operating hours, production rates, and types of materials processed, stored, or combusted during the selected time period.

(iii) The Administrator may presume that source-specific allowable emissions for the unit are equivalent to the actual emissions of the unit.

(iv) For any emissions unit which has not begun normal operations on the particular date, actual emissions shall equal the potential to emit of the unit on that date.

*Id.* at 52,737. In contrast to the proposed regulation's approach, this regulation emphasized "actual emissions." Justifying the shift, EPA explained in the regulation's preamble that while the initial *Alabama Power* decision had used the phrase "potential to emit," the later opinion used language that, "like the [statutory] definition, suggest[ed] changes in actual emissions," and that EPA had followed suit. *Id.* at 52,700. Finally, the 1980 regulation provided that "[a] physical change or change in the method of operation shall not include ... an increase in the hours of operation or in the production rate." *Id.* at 52,735-36.

Several parties petitioned this court for review of the 1980 rule, but we stayed that challenge because of ongoing settlement discussions with EPA. Ultimately, EPA and the parties entered into an agreement \*\*15 \*15 providing that the agency would undertake a new rulemaking and that if the new rule failed to meet certain conditions, the parties could revive their stayed petitions.

In the proceedings before us today, industry petitioners and EPA dispute what the 1980 rule meant. Both agree that for a source to undertake a modification, it must first make a physical or operational change other than an increase in the hours of operation. They disagree over how to measure an "increase" in emitted pollutants once a change has occurred. According to industry petitioners, the 1980 regulation provided that an emissions "increase" occurs only if the maximum hourly emissions rate goes up as a result of the physical or operational change. According to EPA, however, an increase occurs under the 1980 regulations if, after netting, a source's past annual emissions (typically measured by averaging out the two "baseline" years prior to the change) are less than future annual emissions (measured by calculating the source's potential to emit after the change). EPA proffered this

interpretation, which quickly became known as the "actual-to-potential" test, in proceedings leading up to *Puerto Rican Cement Co. v. EPA*, 889 F.2d 292 (1st Cir.1989), and *Wisconsin Electric Power Co. v. Reilly*, 893 F.2d 901 (7th Cir.1990) ("WEPCo"). EPA also referred to this interpretation in its preambles to later rules, see 57 Fed.Reg. 32,314, 32,328 (July 21, 1992); 67 Fed.Reg. 80,186, 80,199 (Dec. 31, 2002).

*Puerto Rican Cement*'s facts illustrate the practical difference between industry's and EPA's interpretations. In that case, a factory sought to make a physical change: it would replace old cement kilns that operated 60% of the time with a new kiln that would emit fewer pollutants per hour. "If operated to achieve about the same level of production [as the old ones], the new kiln will pollute far less than the older kilns; but, if the Company operates the new kiln at significantly higher production levels, it will emit more pollutants than did the older kilns." 889 F.2d at 293. Under the actual-to-potential test, the company "increased" its emissions after the change, making it subject to NSR: operated at full potential, the new kiln would emit more pollutants than the old kilns had emitted when actually in operation. Under the interpretation urged by industry petitioners, however, the company had not undergone an "increase" in emissions-and thus would not trigger NSR-since the new kiln would have a lower hourly emissions rate than the old ones. Siding with EPA, the First Circuit agreed that the company had to obtain an NSR permit to make the intended change. *Id.* at 296-99.

*WEPCo*, which is important because of EPA's response to it, addressed whether EPA could apply the actual-to-potential test to utility plants undergoing extensive renovations. The petitioner argued that given the particular nature of the utility market, it was unfair to compare a utility's past actual emissions with its future potential emissions. Instead, the petitioner argued-and the Seventh Circuit agreed-that EPA should measure future emissions by projecting future actual emissions rather than by assuming, as it had done under the actual-to-potential test, that the source would operate at full capacity in the future. 893 F.2d at 916-18.

The Seventh Circuit decided *WEPCo* shortly before Congress enacted the 1990 amendments to the CAA. In those amendments, Congress added several programs-distinct from NSR-aimed at further securing good air quality through regulating existing sources. See generally Pub.L. No. 101-549, 104 Stat. 2399 (1990) (creating, among other things, programs aimed at reducing acid rain

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and at decreasing\*\*16 \*16 regional haze). Though it also made some changes related to NSR, Congress ultimately neither addressed the issues raised in *WEPCo*, see H.R. CONF. REP. NO. 101-952, at 344-45 (1990), nor revisited its statutory definition of modification, instead leaving it up to EPA to respond to that decision.

EPA dealt with *WEPCo* by issuing a 1992 rule that changed the test utilities used for measuring emissions increases. 57 Fed.Reg. 32,314. Under the new test, known as the “actual-to-projected-actual test,” utilities would determine whether they had post-change increases in emissions-and thus whether they needed NSR permits-by comparing actual emissions before the change to their projections of actual post-change emissions. See *id.* at 32,323-26. In measuring projected emissions, EPA permitted utilities to exclude increases stemming from unrelated demand growth, reasoning that such increases would in no way be caused by physical or operational changes. See *id.* at 32,326-28. The parties call this the “demand growth exclusion.” Applying the actual-to-projected-actual test and the demand growth exclusion to utilities only, EPA left the actual-to-potential test in place for other sources.

Various petitioners challenged the 1992 rule, but once again we stayed the proceedings as EPA began a new rulemaking process. This new process went slowly. EPA issued a proposed rule in 1996, 61 Fed.Reg. 38,250 (July 23, 1996), followed by a 1998 Notice of Availability (“NOA”) requesting additional comment on several issues, 63 Fed.Reg. 39,857 (July 24, 1998), followed in turn by a four-year hiatus. In the meantime, EPA began investigating numerous sources for noncompliance with the existing NSR program. It ended up bringing complaints against thirty-two utilities in ten states.

In 2002, EPA issued a new final rule to “reduce burden, maximize operating flexibility, improve environmental quality, provide additional certainty, and promote administrative efficiency.” 67 Fed.Reg. at 80,189. This rule departed from the prior rules in several significant respects relevant to this litigation. First, it adopted the actual-to-projected-actual test for all existing sources, *id.* at 80,275 (codified at 40 C.F.R. § 52.21(a)(2)(iv)(c) (2004)), though leaving sources the option to continue using the actual-to-potential test if they preferred, *id.* at 80,277 (codified at 40 C.F.R. § 52.21(b)(41)(ii)(d)). Second, it altered the method for measuring past actual emissions. Under the 1980 rule, sources determined past actual emissions by averaging their annual emissions

during the two years immediately prior to the change, though they could use either different, more representative periods or source-specific allowable emissions levels, if they could convince the permitting authorities. In contrast, under the 2002 rule, sources other than electric utilities determine past actual emissions by averaging annual emissions of *any* two consecutive years during the ten years prior to the change. *Id.* at 80,278 (codified at 40 C.F.R. § 52.21(b)(48)(ii)). EPA determined that this change eliminated the need for case-specific alternatives. See *id.* at 80,200. Adopting a statement from the 1992 rule's preamble, the 2002 rule also set a five-year lookback period for electric utilities. *Id.* at 80,278 (codified at 40 C.F.R. § 52.21(b)(48)(i)); see also 57 Fed.Reg. at 32,323. Third, the 2002 rule expanded the 1992 rule's demand growth exclusion, making it applicable to all sources, not just utilities. See 67 Fed.Reg. at 80,277 (codified at 40 C.F.R. § 52.21(b)(41)(ii)(c)). Fourth, the rule provided that sources that saw no reasonable possibility that post-change emissions would prove higher than past actual emissions need keep no records \*\*17 \*17 of actual post-change emissions. See *id.* at 80,279 (codified at 40 C.F.R. § 52.21(r)(6)). Fifth, the rule set forth three specific situations in which sources, without undergoing NSR, could make changes that might otherwise constitute modifications: the Plantwide Applicability Limitations (“PAL”) program, the Clean Unit option, and the Pollution Control Project (“PCP”) exemption. The PAL program permits sources that opt in to make whatever changes they wish during the next ten years without triggering NSR, provided that each year these sources remain below a certain level of emissions. See *id.* at 80,284-89 (codified at 40 C.F.R. § 52.21(aa)). Under the Clean Unit option, sources that install technology “comparable to” BACT (if in PSD regions) or LAER (if in NNSR regions) may make whatever changes they want over the next ten years without triggering NSR, provided that these changes do not cause them to exceed the “emissions limitations” set by their comparable technology. See *id.* at 80,279-83 (codified at 40 C.F.R. § 52.21(x)-(y)). The PCP exemption shields from NSR those sources that install technology that, though substantially reducing emissions of some pollutants, has the effect of causing increases in emissions of other pollutants. See *id.* at 80,275-77, 80,283-84 (codified at 40 C.F.R. §§ 52.21(b)(2)(iii)(h), 52.21(b)(32), 52.21(z)). EPA denied petitions for reconsideration on all matters of significance. 68 Fed.Reg. 63,021 (Nov. 7, 2003).

Numerous petitioners now challenge the 2002 rule.

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Industry petitioners object to the actual-to-projected-actual test, arguing that the CAA requires EPA to compare past potential emissions with future potential emissions (i.e., use a “potential-to-potential” test). They also challenge the readings of the 1980 rule contained in the preambles to the 1992 and 2002 rules, arguing that these preambles impermissibly interpret the 1980 rule as using an actual-to-potential test rather than a potential-to-potential test. One petitioner, Newmont Mining Corporation (“Newmont”), argues that the 2002 rule is arbitrary and capricious because sources may no longer use either source-specific allowable emissions or a “more representative period” for their two-year baseline that occurred more than ten years before the proposed modification. Between them, government and environmental petitioners challenge virtually all aspects of the 2002 rule, including the use of a ten-year lookback period for selecting the two-year baseline, the use of this ten-year lookback period in the netting context, the use of a five-year lookback period for electric utilities, the demand growth exclusion, the recordkeeping standards, and the PAL, Clean Unit, and PCP provisions. They also raise several procedural challenges involving lack of notice. Environmental petitioners additionally challenge the 1992 rule's five-year lookback period in the NSPS context. Government petitioners argue that EPA's presumption that all states must incorporate the 2002 rule's elements into their SIPs violates several statutory provisions. Finally, several intervenors and amici have joined the fray, attacking or defending various aspects of EPA's rules. We consolidated these petitions and now consider them, first addressing industry petitioners' contentions and then turning to the arguments of government and environmental petitioners.

In considering these challenges, we apply a highly deferential standard of review. We may set aside a regulation only if it exceeds EPA's “statutory jurisdiction, authority, or limitations” or is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 42 U.S.C. § 7607(d)(9).

**\*18 \*\*18** As to EPA's interpretation of the CAA, we proceed under *Chevron*'s familiar two-step process. *See* 467 U.S. at 842-43, 104 S.Ct. 2778. In the first step (“*Chevron* Step 1”), we determine whether, based on the Act's language, legislative history, structure, and purpose, “Congress has directly spoken to the precise question at issue.” *Id.* at 842, 104 S.Ct. 2778. If so, EPA must obey. But if Congress's intent is ambiguous, we proceed to the second step (“*Chevron* Step 2”) and consider “whether

the agency's [interpretation] is based on a permissible construction of the statute.” *Id.* at 843, 104 S.Ct. 2778. If so, we will give that interpretation “controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute.” *Id.* at 844, 104 S.Ct. 2778.

Aside from statutory interpretation, we evaluate EPA's actions based on traditional administrative law principles. *See Ethyl Corp. v. EPA*, 51 F.3d 1053, 1064 (D.C.Cir.1995) (noting that the CAA's review provisions are identical to those in the Administrative Procedure Act). “Where, as here, the issue before us requires a high level of technical expertise, we must defer to the informed discretion of the responsible federal agencies.” *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 714 (D.C.Cir.2000) (internal quotation marks and citation omitted). After a “searching and careful inquiry” into the facts, *Am. Trucking Ass'n v. EPA*, 283 F.3d 355, 362 (D.C.Cir.2002), we will find EPA's actions arbitrary and capricious if the agency has failed to “examine the relevant data and articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choice made,” *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983) (internal quotation marks and citation omitted), or has reached a conclusion unsupported by substantial evidence, *Ass'n of Data Processing Serv. Orgs., Inc. v. Bd. of Governors of the Fed. Reserve Sys.*, 745 F.2d 677, 683-84 (D.C.Cir.1984). The standard of review “does not,” however, “permit us to substitute our policy judgment for that of the Agency.” *Bluewater Network v. EPA*, 370 F.3d 1, 11 (D.C.Cir.2004).

## II. Industry Challenges

Various firms and industry associations advance three main challenges. First, industry petitioners attack the 2002 rule's definition of “modification” for NSR purposes on the ground that it unlawfully differs from its definition for NSPS purposes. While the NSPS regulatory definition of modification allegedly focuses on the hourly rate of emissions, the NSR definition focuses on net emissions increases measured in tons per year. *Compare* 40 C.F.R. § 60.14 (NSPS), *with id.* § 52.21(b)(2)(ii)(NSR). Industry claims that this divergence is unlawful because Congress intended to adopt for NSR purposes the NSPS regulatory definition in existence at the time of the 1977 amendments. (Industry petitioners also challenge the 1980 rule's definition of modification in the NSR context to the extent that it differs from the NSPS definition.) We are

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not convinced.

Second, industry petitioners argue that statements in the preamble to the 2002 rule constitute an unlawful interpretation of the 1980 rule. Because of multiple uncertainties about the existence or likely application of any such interpretation, let alone any burden to petitioners from delay of adjudication, we find the issue unripe.

Third, the previous rules allowed states to use source-specific emissions limitations as proxies for actual emissions. 45 Fed.Reg. at 52,737 (previously codified at 40 C.F.R. § 52.21(b)(21) (1981)). Petitioner \*\*19 \*19 Newmont challenges the elimination of this provision in the 2002 rule, arguing that EPA's decision lacks adequate reasoning and violates the statute. We find neither argument convincing.

#### A.

*Modification.* Industry rests its claim that modification must have the same regulatory meaning for NSR as prevailed for NSPS in 1977 on the fact that Congress, by a cross-reference, used the same language in both statutory contexts. Thus, the NNSR portion of the Act provided:

The terms “modifications” and “modified” mean the same as the term “modification” as used in section 7411(a)(4) of this title.

42 U.S.C. § 7501(4). Similarly, the PSD portion of the statute provides that “construction” includes “the modification (as defined in section 7411(a) of this title) of any source or facility.” *Id.* § 7479(2)(C). So far as appears, then, these incorporations by reference are the equivalent of Congress's having simply repeated in the NSR context the definitional language used before in the NSPS context.

[1] We have (naturally) required indications in the statutory language or history to infer that Congress intended to incorporate into a statute a preexisting regulatory definition. See *Continental Air Lines, Inc. v. Dep't of Transp.*, 843 F.2d 1444, 1454 (D.C.Cir.1988). Industry suggests there is “abundant indication” of such intent, pointing to Congress's having said that modification (in the NNSR portion of the statute) has the meaning of the same word “as used in” the NSPS portion of the statute. It also cites a conference committee report

that explains agreement to cover modification as well as construction in Part C of the Act (PSD) (a point apparently originally excluded unintentionally) by saying that construction is being defined “to conform to *usage* in other parts of the Act.” See 123 CONG. REC. 32,253 (Nov. 1, 1977) (emphasis added). But the phrases “usage” and “used in” refer not to regulatory usage, but only to usage in the statute itself. They tell us no more than if Congress had used a little more ink and repeated the NSPS definitions verbatim. Elsewhere in the Act, moreover, Congress did incorporate regulatory provisions expressly by reference. See, e.g., Pub.L. No. 95-95, § 129(a)(1), 91 Stat. 685, 745 (1977) (“the interpretative regulation of the Administrator of the Environmental Protection Agency published in 41 Federal Register 55524 ... shall apply ....”) (incorporating EPA's offset ruling); 42 U.S.C. § 7502 note. Congress's failure to use such an express incorporation of prior regulations for “modification” cuts against the proposed inference.

Industry petitioners also invoke *Bragdon v. Abbott*, 524 U.S. 624, 632, 118 S.Ct. 2196, 141 L.Ed.2d 540 (1998), for the proposition that when Congress repeats a well-established term, it implies that Congress intended the term to be construed in accordance with preexisting regulatory interpretations. But that proposition does industry little good here, as the regulatory definitions in the NSPS and PSD programs already differed at the time of the 1977 amendments. See Part I, *supra*, at 10-12 (comparing regulatory definitions of NSPS and PSD programs).

In fact, the NSPS regulations adopted in 1975 and in force at the time of the 1977 CAA amendments themselves used two different (and possibly inconsistent) definitions of modification. Section 60.2(h) defined modification to include “any physical change in, or change in the method of operation of, an existing facility which increases the amount of any air pollutant (to \*\*20 \*20 which a standard applies) emitted into the atmosphere by that facility.” 40 Fed.Reg. at 58,418 (previously codified at 40 C.F.R. § 60.2(h) (1976)). But 40 C.F.R. § 60.14(a) provided that “any physical or operational change to an existing facility which results in an increase in the emissions rate to the atmosphere of any pollutant to which a standard applies shall be considered a modification,” and § 60.14(b) specified that the emissions rate should be expressed in “kg/hr of any pollutant discharged into the atmosphere.” 40 Fed.Reg. at 58,419; see also Part I, *supra*, at 10. Industry's briefs, curiously, mention only § 60.14, never § 60.2(h). Given the two quite differently worded

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regulatory definitions of “modification” *within* the NSPS program at the time of the 1977 amendments, it would take a rather pointed indication from Congress to support the idea that it expressly adopted one of them for NSR. No such indication exists. We express no opinion as to whether Congress intended to require that EPA use identical regulatory definitions of modification across the NSPS and NSR programs. *Cf. United States v. Duke Energy Corp.*, No. 04-1763, slip op. at 11-19 (4th Cir. June 15, 2005). That argument was not made by industry petitioners in their opening brief and is therefore waived. *See Verizon Tel. Cos. v. FCC*, 292 F.3d 903, 911-12 (D.C.Cir.2002). As industry makes no attack at all on the reasonableness of EPA's definition of modification for NSR (apart from its divergence from one of the 1975 NSPS definitions), we reject this portion of industry's challenge to the 1980 and the 2002 rules.

## B.

[2] *Interpretation of 1980 Rule in 2002 Preamble.* Industry petitioners also challenge an allegedly new interpretation of the 1980 rule contained in the preamble to the 2002 rule. Specifically, industry objects to the following sentence in the preamble:

Prior to today, the regulations applied an actual-to-future-actual applicability test for EUSGUs [Electric Utility Steam Generation Units] and *an actual-to-potential applicability test for all other emissions units.*

67 Fed.Reg. at 80,199 (emphasis added). Industry petitioners' claim is that by uttering the above sentence, EPA attempted to interpret the 1980 rule retroactively to require a “universal actual-to-potential test.” Such an interpretation would be, industry claims, substantively inconsistent with the 1980 rule and the Act, and in violation of various procedural requirements for amendments of agency rules. Industry petitioners raise a similar objection to the 1992 rule's preamble. Br. for Industry Pet'rs at 29 n.46, 32 n.52.

[3] These claims are unripe. Ripeness depends on (1) the fitness of the issue for judicial review, and (2) the hardship to the parties of withholding a judicial decision. *See Abbott Labs. v. Gardner*, 387 U.S. 136, 148, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967). Fitness is highly questionable here, as the disputed sentence appears to be as EPA claims-no more than a short-hand reference to the 1980 rule, not a formal interpretation. If industry's fears

should prove well-grounded, review could proceed more intelligibly on a clearer record. *See Am. Iron & Steel Inst. v. EPA*, 115 F.3d 979, 990 (D.C.Cir.1997); *State Farm Mut. Auto. Ins. Co. v. Dole*, 802 F.2d 474, 479 (D.C.Cir.1986).

Nor has industry shown that delay of review will inflict any hardship. The usual form of hardship is to put a regulated firm to a choice between submission and violation, each with its attendant nonrecoverable costs. But the new (2002) rule has been applicable for three years now. For \*21 \*\*21 *planning* purposes the 1980 rule appears moot. If there are still pending applications of the 1980 rule in which EPA attempts to employ the disputed sentence (which seems improbable in light of its express disclaimer), judicial proceedings addressed to the application could solve the problem of any affected firm.

## C.

[4] *Source-Specific Allowable Emissions.* The previous rules allowed state SIPs to provide for calculation of baseline emissions by using a unit's “source-specific allowable emissions” as the unit's actual emissions. *See* 45 Fed.Reg. at 52,737 (previously codified at 40 C.F.R. § 52.21(b)(21) (1981)). Petitioner Newmont challenges the elimination of this provision in the 2002 rule, arguing that EPA's decision lacks adequate reasoning and violates the statute.

EPA's reasoning was simple enough-that the baseline is intended to be an indicator of emissions associated with utilization “actually achieved.” *See* EPA, TECHNICAL SUPPORT DOCUMENT FOR THE PREVENTION OF SIGNIFICANT DETERIORATION AND NONATTAINMENT AREA NEW SOURCE REVIEW REGULATIONS I-3-11 (2002) (“TSD”). Otherwise changes increasing emissions beyond historic levels would avoid NSR. *Id.*; *see also id.* I-5-9, II-3-9. Newmont makes the counterargument that EPA's decision imposes a foolhardy “use it or lose it” regime in which sources are encouraged to continue emitting at high levels to avoid losing the “right” to emit. A closer approximation is that the rule imposes a “use it for twenty-four months in ten years or lose it” regime, in which “lose it” entails an obligation to comply with review procedures for modifications at the source. In any event, such choices are for EPA to make so long as the agency engages in reasoned decision-making. *See Bluewater Network*, 370 F.3d at 11. Although EPA never expressly addressed this

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possibly perverse incentive, its resolute focus on the significance of changes in “actual” emissions suggests that it found the risk of firms’ strategic use of emissions ceilings relatively minor when compared with the benefits of catching actual increases and subjecting them to NSR. See *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285-86, 95 S.Ct. 438, 42 L.Ed.2d 447 (1974) (“we will uphold a decision of less than ideal clarity if the agency’s path may reasonably be discerned”); *ACS of Anchorage Inc. v. FCC*, 290 F.3d 403, 408 (D.C.Cir.2002).

Newmont’s statutory claim is that eliminating the states’ discretion to use source-specific allowable emissions as the emissions baseline violates the Act’s principles of power sharing between the states and the federal government. Indeed the Act does have roles for both levels of government. See *Virginia v. EPA*, 108 F.3d 1397, 1408 (D.C.Cir.1997). While states are responsible for writing SIPs, the Act gives EPA responsibility for developing basic rules for the NSR program, see 42 U.S.C. § 7503(a)(1), a responsibility that clearly includes choosing a methodology for calculating baseline emissions. We see no violation of Congress’s assignment of duties.

### III. Baseline Emissions

The NSR provisions of the CAA require “new and modified major stationary sources” of air pollution to obtain preconstruction permits and to install pollution control technology in order to protect and enhance air quality. 42 U.S.C. §§ 7475, 7502, 7503. An existing source triggers NSR when it makes a “modification,” defined as:

any physical change in, or change in the method of operation of, a stationary \*\*22 \*22 source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted.

*Id.* § 7411(a)(4). To determine whether a change “increases” emissions, the source must first calculate its baseline level of “actual emissions.” See 57 Fed.Reg. at 32,316. The 1980 rule defined “actual emissions” as “the average rate, in tons per year, at which the unit actually emitted the pollutant during a two-year period which precedes the [change] and which is representative of normal source operation.” 45 Fed.Reg. at 52,737 (codified

at 40 C.F.R. § 52.21(b)(21)(ii)). The 1980 rule also provided for “the use of a different time period upon a determination that it is more representative of normal source operation.” *Id.* While EPA historically used the two-year period immediately preceding the change to calculate baseline actual emissions, “in some cases” it allowed use of “an earlier period.” 67 Fed.Reg. at 80,188.

The 2002 rule reinterprets the term “increases” by adopting a new method for calculating baseline actual emissions. See *id.* at 80,191. For sources other than electric utilities, “baseline actual emissions” are defined as “the average rate, in tons per year, at which the emissions unit actually emitted the pollutant during any consecutive 24-month period selected by the [source] within the 10-year period immediately preceding [the change].” *Id.* at 80,278 (codified at 40 C.F.R. § 52.21(b)(48)(ii)). A source must adjust its baseline downward to reflect any legally enforceable emissions limitations that have been imposed since the baseline period, see *id.* (codified at 40 C.F.R. § 52.21(b)(48)(ii)(c)), and it may not use a more “representative” baseline period outside the ten-year “lookback period,” see *id.* at 80,195. A source may use a different baseline period for each regulated pollutant. See *id.* (codified at 40 C.F.R. § 52.21(b)(48)(ii)(d)). The 2002 rule also codifies the presumption established in the 1992 rule that for an electric utility, “any 2 consecutive years within the 5 years prior to the proposed change is representative of normal source operations.” 57 Fed.Reg. at 32,323; see 67 Fed.Reg. at 80,278 (codified at 40 C.F.R. § 52.21(b)(48)(i)).

Government and environmental petitioners raise two sets of challenges to the ten-year lookback period. First, they contend that the ten-year lookback period reflects an impermissible interpretation of the statutory term “increases” because it allows sources to increase their emissions beyond their most recent levels without triggering NSR. Second, they contend that EPA’s selection of a ten-year lookback period is arbitrary and capricious because it contravenes the statutory purpose of protecting and enhancing air quality. For the following reasons, we conclude that petitioners’ challenges to the ten-year lookback period fail to overcome the presumption of validity afforded to EPA regulations under the CAA. See *Int’l Fabricare Inst. v. EPA*, 972 F.2d 384, 389 (D.C.Cir.1992).

A.

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*Statutory Interpretation.* While the CAA defines a “modification” as any physical or operational change that “increases” emissions, it is silent on how to calculate such “increases” in emissions. 42 U.S.C. § 7411(a)(4). According to government petitioners, the lack of a statutory definition does not render the term “increases” ambiguous, but merely compels the court to give the term its “ordinary meaning.” See *Engine Mfrs. Ass’n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 124 S.Ct. 1756, 1761, 158 L.Ed.2d 529 (2004); *Bluewater Network*, 370 F.3d at 13; **\*\*23\*23** *Am. Fed’n of Gov’t Employees v. Glickman*, 215 F.3d 7, 10 (D.C.Cir.2000). Relying on two “real world” analogies, government petitioners contend that the ordinary meaning of “increases” requires the baseline to be calculated from a period immediately preceding the change. They maintain, for example, that in determining whether a high-pressure weather system “increases” the local temperature, the relevant baseline is the temperature immediately preceding the arrival of the weather system, not the temperature five or ten years ago. Similarly, in determining whether a new engine “increases” the value of a car, the relevant baseline is the value of the car immediately preceding the replacement of the engine, not the value of the car five or ten years ago when the engine was in perfect condition.

EPA maintains that its choice of the ten-year lookback period is entitled to deference under *Chevron* Step 2 because it is based on a permissible construction of the ambiguous term “increases.” 67 Fed.Reg. at 80,199. EPA disputes the validity of government petitioners’ analogies, pointing out, for example, that if the weather system arrives in the evening, it is inappropriate to compare the nighttime temperature immediately following the arrival of the system to the daytime temperature immediately preceding the arrival of the system. The important point is that the period immediately preceding a change may not be analogous to the period following the change and thus may not yield a meaningful comparison for the purpose of determining whether the change “increases” emissions. Hence, government petitioners’ reliance on the “ordinary meaning” of “increases” fails to address a practical reality. Indeed, during oral argument, counsel for government petitioners agreed that the provision in the 1980 rule for use of a “more representative” period not immediately preceding the change is consistent with the statutory language because some flexibility is needed to account for anomalous disruptions in operations. It follows that the statutory term “increases” does not plainly and unambiguously require the baseline period to immediately precede the change. Rather, the statute is

silent or ambiguous on how to calculate baseline emissions, and the issue is whether the ten-year lookback period is based on a permissible interpretation of the statute under *Chevron* Step 2.

[5][6] Under *Chevron* Step 2, a court must defer to the agency’s interpretation of the ambiguous statutory term if it “represents a reasonable accommodation of conflicting policies that were committed to the agency’s care by the statute.” *Chevron*, 467 U.S. at 845, 104 S.Ct. 2778 (quoting *United States v. Shimer*, 367 U.S. 374, 383, 81 S.Ct. 1554, 6 L.Ed.2d 908 (1961)). In particular, the agency’s interpretation is entitled to deference when “the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies.” *Id.* at 865, 104 S.Ct. 2778.

[7] There can be no doubt that EPA is entitled to balance environmental concerns with economic and administrative concerns, at least to a point. The Supreme Court recognized in *Chevron* that, in enacting the NSR program, “Congress sought to accommodate the conflict between the economic interest in permitting capital improvements to continue and the environmental interest in improving air quality,” *id.* at 851, 104 S.Ct. 2778, and delegated the responsibility of balancing those interests to EPA, *id.* at 865, 104 S.Ct. 2778. Different interpretations of the term “increases” may have different environmental and economic consequences, and in administering the NSR program and filling in the gaps left by Congress, **\*\*24 \*24** EPA has the authority to choose an interpretation that balances those consequences. See *id.* at 843, 104 S.Ct. 2778. In so doing, the Supreme Court has instructed, EPA may “properly rely upon the incumbent administration’s view of wise policy to inform its judgments.” *Id.* at 865, 104 S.Ct. 2778. Furthermore, as there is no question that the NSR program is technical and complex, *id.* at 848, 104 S.Ct. 2778, EPA may properly rely on its extensive experience and expertise in administering the program. Cf. *Nuclear Energy Inst., Inc. v. EPA*, 373 F.3d 1251, 1296 (D.C.Cir.2004) (per curiam). Based on what EPA describes in its brief as more than twenty years of experience with the NSR program under the 1980 rule and more than “ten years of review, analysis, and communications with stakeholders,” Br. for Resp’t at 69, EPA responded to industry complaints that the 1980 rule was “too complex and burdensome” and adopted the ten-year lookback period as part of an effort to simplify and streamline the NSR program without sacrificing air quality. 61 Fed.Reg. at 38,252. Based on

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their own experience with the 1980 rule, state intervenors Alaska, Indiana, Kansas, Nebraska, North Dakota, South Carolina, South Dakota, Utah, and Virginia concur with EPA's conclusion that the NSR program has been "broken for many years and [is] long overdue to be fixed." Br. for State Intervenor at 17.

It is EPA's position that the ten-year lookback period is based on a permissible interpretation of the CAA because it "fulfills the statutory goal of balancing economic growth with the need to protect air quality." Br. for Resp't at 69. According to EPA, the ten-year lookback period promotes economic growth and administrative efficiency by affording sources the flexibility to respond rapidly to market changes, focusing limited regulatory resources on changes most likely to harm the environment, and eliminating conflicts over whether a proposed baseline period is "more representative of normal source operations." 67 Fed.Reg. at 80,191-92. At the same time, EPA believes that the ten-year lookback period protects air quality by eliminating the regulatory disincentive to make physical or operational changes that improve efficiency and reduce emissions rates. *Id.* at 80,192. We conclude that EPA supports these conclusions with "detailed and reasoned" analysis based on its experience and expertise. *Chevron*, 467 U.S. at 865, 104 S.Ct. 2778.

In explaining the benefits of the ten-year lookback period, EPA appropriately refers to the problems experienced under the 1980 rule. EPA notes that under the 1980 rule, establishing a representative baseline period other than the two-year period immediately preceding the change was "complex and time-consuming" and often involved "disputed judgment calls." 61 Fed.Reg. at 38,258. EPA further notes that under the 1980 rule, sources experiencing periods of low production faced the unwelcome choice of either "surrendering capacity" by capping emissions at unrepresentative low levels or incurring the time and expense of securing NSR permits "for even small, non-excluded changes to a portion of the plant." *Id.* According to industry comments on the ten-year lookback period, this dilemma discourages sources from making economically efficient and environmentally beneficial changes during periods of low production. See TSD at I-4-5, I-4-17. Similarly, as EPA points out in its brief, government petitioner New Jersey explained in comments on the ten-year lookback period that the 1980 rule "results in a baseline that decreases each time production decreases. In other words, if economic downturn temporarily slows production at a facility for a few years, the facility's baseline actually decreases\*\*25

\*25 and the facility loses operational flexibility. It also discourages facilities from voluntarily implementing pollution prevention measures." Letter from Catherine Cowan, Assistant Comm'r, N.J. Dep't of Env'tl. Protection, to EPA (Dec. 4, 1996) (Docket A-90-37, Entry IV-D-172). EPA confirms that one "common complaint" about the 1980 rule is that sources have "limited ability to consider the operational fluctuations associated with normal business cycles when establishing baseline actual emissions unless [the] reviewing authority agrees that another period is 'more representative of normal source operation.'" 67 Fed.Reg. at 80,191-92.

In response to these concerns, EPA commissioned a study of the business cycles of nine major emitting industries, including charcoal production, carbon black manufacturing, Portland cement manufacturing, lime manufacturing, iron and steel manufacturing, primary copper smelting, primary aluminum production, primary zinc and lead smelting, and secondary metal production. See EASTERN RESEARCH GROUP, INC., BUSINESS CYCLES IN MAJOR EMITTING SOURCE INDUSTRIES (1997) ("BUSINESS CYCLE STUDY"). The study examined industry output data from 1982 to 1994 and measured each industry's business cycle from peak to peak and from trough to trough. *Id.* at 1-2. Peak-to-peak cycles ranged from three to six years, and trough-to-trough cycles ranged from three to eight years. *Id.* at 16.

Government and environmental petitioners contend that the business cycle study does not support EPA's choice of a ten-year lookback period because none of the industries in the study had business cycles longer than eight years, and the study did not consider whether emissions vary with business cycles. However, petitioners ignore the study's conclusions that "business cycles differ markedly by industry" and that "a minimum of ten years of data is recommended to capture an entire industry cycle." *Id.* Moreover, while the study did not track emissions, it did track output, which generally correlates with emissions. See 67 Fed.Reg. at 80,201; *Puerto Rican Cement*, 889 F.2d at 297-98. Hence, the business cycle study supports EPA's conclusion that a ten-year lookback period "is a fair and representative time frame for encompassing a source's normal business cycle." 67 Fed.Reg. at 80,200. Based on "their experience over the years in implementing the NSR program," state intervenors agree that a ten-year lookback period is reasonable, Br. for State Intervenor at 10, and government and environmental petitioners provide no basis for the court to determine

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whether a particular time frame is reasonable under the CAA. Absent such an explanation, the court must defer to EPA's policy choice because it is supported by the business cycle study and not "manifestly contrary to the statute." *Chevron*, 467 U.S. at 844, 104 S.Ct. 2778.

Environmental petitioners further contend that the ten-year lookback period does not ensure a representative baseline because it allows sources with shorter business cycles to choose among two or three peaks, not just the most recent one. Similarly, petitioner Newmont contends that the ten-year lookback period does not ensure a representative baseline because it fails to capture the entire business cycle of the gold industry, which it claims is longer than ten years. Newmont contends in its brief that the gold industry has not completed a full business cycle since 1980 because the price of gold has not returned to \$700 per ounce. At oral argument, counsel for Newmont admitted the implausibility of this contention. Business cycles are measured from peak to peak or from trough to trough based on comparative fluctuations in output; nothing requires \*\*26 \*26 the peaks to reach the same level of output, much less the same price. According to Newmont's graph of gold prices, the price of gold peaked at \$500 per ounce in 1983 and 1988, and at \$400 per ounce in 1990, 1994, and 2004. Thus, Newmont provides no basis for the court to conclude that the gold industry's business cycle is longer than ten years.

EPA recognizes that "business cycles differ markedly by industry," 67 Fed.Reg. at 80,200, as the business cycle study itself indicates, *see* BUSINESS CYCLE STUDY at 16. But in an effort to promote operational flexibility and administrative efficiency, EPA chose to apply a fixed ten-year lookback period to all sources in order to lend "clarity and certainty to the process" and to avoid the administrative burden of determining "representative" baselines on a case-by-case basis. 67 Fed.Reg. at 80,200; TSD at I-2-10. This policy choice, which reconciles conflicting interests in accuracy and efficiency, based on years of regulatory experience, is entitled to deference under *Chevron* Step 2, for petitioners fail to demonstrate that EPA's choice is impermissible under the CAA. *See Chevron*, 467 U.S. at 844, 864-66, 104 S.Ct. 2778.

In addition to challenging EPA's business cycle study, environmental petitioners contend that the ten-year lookback period violates this court's interpretation of the CAA in *Alabama Power*, 636 F.2d 323. Under *Alabama Power* and the 1980 rule, a physical or operational change constitutes a "modification" subject to NSR only if it

results in a *net* increase in emissions; thus, a source making a change that increases emissions from one unit can "net out" of NSR based on a "contemporaneous" change that decreases emissions from another unit. *See id.* at 401-02; 45 Fed.Reg. at 52,736 (codified at 40 C.F.R. § 52.21(b)(3)). The court stated in *Alabama Power* that EPA has "discretion, within reason, to define which changes are contemporaneous," 636 F.2d at 402, and the 1980 rule defines "contemporaneous" as within a five-year period, *see* 45 Fed.Reg. at 52,736 (codified at 40 C.F.R. § 52.21(b)(3)(ii)). The 2002 rule retains this definition of "contemporaneous" but allows a source to use a ten-year lookback period to calculate baseline emissions when determining whether an offsetting change decreases emissions. *See* 67 Fed.Reg. at 80,197. For example, to determine whether a change made in 2005 will trigger NSR, a source may use baseline emissions from 1995 and 1996 to calculate the emissions increase caused by the 2005 change; it may then choose an offsetting change made in 2000 and use baseline emissions from 1990 to 1991 to calculate the emissions decrease caused by the 2000 change in order to determine whether that decrease offsets the increase caused by the 2005 change.

Rather than challenge the five-year contemporaneity period as such, environmental petitioners contend that the ten-year lookback period combined with the five-year contemporaneity period allows a source to avoid NSR based on a fifteen-year-old decrease in emissions, thereby violating the contemporaneity requirement of *Alabama Power*. An emissions increase caused by a change made in 2005, for example, can be offset by an emissions decrease that relies on a baseline from 1990. But as EPA points out, it is only the baseline of the emissions decrease that is fifteen years old, not the change that causes the decrease, which must still occur within five years of the change that causes the increase. *See* 67 Fed.Reg. at 80,197. *Alabama Power* requires only that "any offset *changes* claimed by industry must be substantially contemporaneous," not that the baselines must be substantially contemporaneous. 636 F.2d at 402 (emphasis added). Therefore, environmental \*\*27 \*27 petitioners fail to demonstrate that the ten-year lookback period violates the contemporaneity requirement of *Alabama Power*.

Environmental petitioners' remaining challenges to EPA's interpretation of the statutory term "increases" are unavailing. Their response to EPA's "causation argument" that an increase in emissions must exceed historical levels

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to be causally related to the change, Br. for Env'tl. Pet'rs at 14-15, is irrelevant because EPA advances no such argument in support of the ten-year lookback period. Their contention that the ten-year lookback period "administratively excise[s] the statutory word 'any' by excluding *some* emissions-increasing changes" from NSR, *id.* at 13, is misplaced because the 2002 rule redefines the baseline such that "any" change that increases emissions beyond the redefined baseline still triggers NSR. Environmental petitioners' similar contention that the 1992 rule violates the statutory term "any" by excluding some emissions-increasing changes from NSPS fails for the same reason. Their challenge to EPA's provision for use of different baseline periods for different pollutants fails, for EPA explains that emissions of different pollutants depend on different factors and that a single source may produce different products subject to different business cycles.

In enacting the NSR program, Congress did not specify how to calculate "increases" in emissions, leaving EPA to fill in that gap while balancing the economic and environmental goals of the statute. See Chevron, 467 U.S. at 843-44, 104 S.Ct. 2778. Based on its experience with the NSR program and its examination of the relevant data, EPA determined that a ten-year lookback period would alleviate the problems experienced under the 1980 rule and advance the economic and environmental goals of the CAA. Because we conclude that petitioners fail to demonstrate that EPA's policy determination is impermissible, we defer to EPA's statutory interpretation under *Chevron* Step 2, and we turn to petitioners' challenges to the environmental impact of the ten-year lookback period.

## B.

*Environmental Impact.* Government and environmental petitioners contend that EPA's choice of a ten-year lookback period is arbitrary and capricious because it allows sources to increase their emissions to historic levels without triggering NSR, thereby harming air quality and public health. Environmental petitioners similarly contend that the five-year lookback period for electric utilities is arbitrary and capricious but provide no evidence or analysis to support this contention. Government petitioners emphasize that NSR is a "critical tool" for attaining and maintaining CAA air quality standards, and that the 2002 rule "severely undermines this tool by requiring States to allow older, poorly-controlled sources to continue operating without pollution

controls well into the future." Br. for Gov't Pet'rs at 13. In *Alabama Power*, the court recognized that the "statutory scheme intends to 'grandfather' existing industries; but the provisions concerning modifications indicate that this is not to constitute perpetual immunity from all standards under the PSD program. If these plants increase pollution, they will generally need a permit." *Alabama Power*, 636 F.2d at 400; see also *WEPCo*, 893 F.2d at 909-10.

Government petitioners maintain that the ten-year lookback period frustrates the purpose of the modification provision by allowing sources to restore their emissions capacities to historic levels without obtaining NSR permits. Likewise, environmen\*28 tal\*\*28 petitioners contend that the ten-year lookback period unlawfully seeks "to preserve a unit's historical operating levels and associated emissions." Br. for Env'tl. Pet'rs. at 12 (quoting TSD at I-2-2) (internal quotation marks omitted). They explain that as sources age, their operating capacities diminish "by roughly one percentage point for each year of age." *Id.* (quoting Memorandum from Bruce Biewald & David White, Synapse Energy Econ., Inc., to David Hawkins, Natural Res. Def. Council 12 (Aug. 12, 1998) (Docket A-90-37, Entry IV-D-303)). Therefore, they conclude, "physical or operational changes that restore an existing source to its original capacity significantly increase the amount of pollution emitted by that source as compared to its emissions level during the period immediately preceding the change." *Id.*

EPA acknowledges that fewer changes will trigger NSR under the 2002 rule than under the 1980 rule. 67 Fed.Reg. at 80,192. However, based on its experience and its Environmental Impact Analysis, see EPA, **NEW SOURCE REVIEW (NSR) IMPROVEMENTS: SUPPLEMENTAL ANALYSIS OF THE ENVIRONMENTAL IMPACT OF THE 2002 FINAL NSR IMPROVEMENT RULES (2002) ("ENVIRONMENTAL IMPACT ANALYSIS")**, EPA "believe[s] that the environment will not be adversely affected" by the ten-year lookback period "and in some respects will benefit" from it, 67 Fed.Reg. at 80,192. As noted, it is EPA's position that the ten-year lookback period eliminates the regulatory disincentive for sources to implement changes that improve operating efficiency and reduce emissions rates. See *id.* EPA further believes that the ten-year lookback period will not hinder states from achieving CAA air quality standards because NSR is not the primary mechanism for reducing emissions from existing sources. EPA explains in its Report to the President:

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The NSR program is by no means the primary regulatory tool to address air pollution from existing sources. The Clean Air Act provides for several other public health-driven and visibility-related control efforts: for example, the National Ambient Air Quality Standards Program implemented through enforceable State Implementation Plans, the NO<sub>x</sub> SIP Call, the Acid Rain Program, the Regional Haze Program, etc. Thus, while NSR was designed by Congress to focus particularly on sources that are newly constructed or that make major modifications, Congress provided numerous other tools for assuring that emissions from existing sources are adequately controlled.

EPA, **NEW SOURCE REVIEW: REPORT TO THE PRESIDENT** 3-4 (2002). According to EPA, “these programs have achieved, and will continue to achieve, tens of millions of tons per year of [emissions] reductions which are completely unaffected by the [2002] rule.” ENVIRONMENTAL IMPACT ANALYSIS at 3. Moreover, industry intervenors point to several safeguards in the 2002 rule to protect air quality. First, the baseline must be adjusted downward to reflect any legally enforceable emissions limitations that have been imposed since the baseline period. *See* 67 Fed.Reg. at 80,278 (codified at 40 C.F.R. § 52.21(b)(48)(ii)(c)). Second, a source can use a particular baseline period only if it has enough information on record to calculate the average annual emissions during that period. *See id.* (codified at 40 C.F.R. § 52.21(b)(48)(ii)(e)). Third, the baseline cannot include emissions that exceeded any legally enforceable emissions limitations imposed during the baseline period. *See id.* (codified at 40 C.F.R. § 52.21(b)(48)(ii)(b)).

Furthermore, EPA rejects petitioners' evidence as flawed, and petitioners do not dispute EPA's critique. In challenging the environmental impact of the 2002 rule, **\*\*29 \*29** government petitioners cite affidavits alleging that the ten-year lookback period will allow certain sources—three paper mills in Maine, a paper mill in New Hampshire, two automobile manufacturers in New Jersey, and an oil refinery in Delaware—to increase their baselines. They also rely on a study by the Environmental Integrity Project concluding that the ten-year lookback period will allow 1,273 major sources to increase their emissions by nearly 1.4 million tons in twelve key states. *See* ENVTL. INTEGRITY PROJECT & COUNCIL OF STATE GOV'TS/E. REG'L CONFERENCE, REFORM OR ROLLBACK? HOWWW EPA'S CHANGES TO **NEW**

**SOURCE REVIEW AFFECT AIR POLLUTION IN 12 STATES** 1-1 (2003) (“EIPREPORT”). In reconsidering the 2002 rule, EPA examined this study and found it to be flawed. *See* EPA, TECHNICAL SUPPORT DOCUMENT FOR THE PREVENTION OF SIGNIFICANT DETERIORATION (PSD) AND NONATTAINMENT AREA **NEW SOURCE REVIEW** (NSR): RECONSIDERATION (2003) 123-32 (“RECONSIDERATION TSD”). In particular, EPA rejected the study on four grounds: (1) it did not account for why emissions had decreased in the most recent two years; (2) it analyzed emissions on a source-wide basis instead of a unit-wide basis; (3) it ignored netting; and (4) it assumed rather than proved that sources would emit up to their historic baselines. *Id.* at 125-26. Government petitioners offered no response.

In addition, EPA's Environmental Impact Analysis responds to government petitioners' contention that the ten-year lookback period eliminates opportunities to reduce emissions by allowing sources to avoid NSR. It also responds to government petitioners' contention that adjusting the baseline downward to reflect any legally enforceable emissions limitations is irrelevant because, as EPA itself observes, “typical source operation frequently does result in actual emissions that are below allowable emission levels.” Br. for Gov't Pet'rs at 23 (quoting TSD at I-6-8).

EPA concluded in its Environmental Impact Analysis that the “overall consequences” of the ten-year lookback period are “negligible” because it affects only “a very small number of facilities.” ENVIRONMENTAL IMPACT ANALYSIS at 2. Based on data from recent NSR permits, EPA's 1999 Trends Report, and the National Emissions Inventory, EPA estimated that 90% of the environmental benefits of the NSR program come from new sources, modifications at electric utilities, modifications at sources where emissions have been highest in recent years, and modifications at sources where emissions have been relatively stable—none of which are affected by the ten-year lookback period. *Id.* app. F at 3-4. EPA estimated that of the remaining 10% of sources where emissions have been lower in recent years, 70% are subject to legally enforceable emissions limitations that must be incorporated into their baselines and thus cannot claim higher baselines under the ten-year lookback period. *See id.* app. F at 4-6. EPA further observed:

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Indeed, such sources could face lower baselines under the [2002] rule if controls are applied toward the end of the representative two-year period. This leaves only the case where emissions are lower as a result of decreased utilization due to decreased market demand, some kind of outage, or other circumstance. Even in this case, it is not clear that a different baseline would result, because the source is eligible, under [the 1980 rule], to request a more representative baseline than the previous two years. It is reasonable to assume that sources facing recent drops in utilization would be able to make credible cases to their permitting authorities that the recent levels were not representative of their normal operation.

**\*30** **\*\*30** *Id.* app. F at 7-8. Thus, regarding the remaining 3% of sources, EPA concluded that “baselines may or may not be higher under [the 2002 rule], depending upon how often case-by-case baselines would be established under the [1980] rule’s allowance for more representative periods.” *Id.* app. F at 6. Although EPA recognized that it lacked sufficient data to determine whether the ten-year lookback period would result in an overall increase or decrease in emissions, it concluded that “in either case, the magnitude of the change is likely to be very small.” *Id.* app. F at 7. According to EPA, “because the number of sources receiving different baselines represents a small fraction of the overall NSR permit universe,” the ten-year lookback period “will not result in any significant change in benefits derived from the rule.” *Id.* app. F at 8.

Still, as government petitioners point out, even “small” increases in emissions can harm public health. Government petitioners cite several studies demonstrating the relationship between increases in emissions of particulate matter and increases in mortality rates, especially among diabetics, asthmatics, and children. Similarly, the American Thoracic Society and other amici curiae point to studies indicating that emissions of particulate matter significantly increase mortality rates, especially among infants of poor families; increase lung cancer rates; aggravate asthma and other respiratory diseases; and impose significant social welfare costs. Again, relying on its Environmental Impact Analysis, EPA believes that the 2002 rule “will result in health and welfare benefits from reduced concentrations of pollutants.” Br. for Resp’t at 78 (quoting ENVIRONMENTAL IMPACT ANALYSIS at 2) (internal quotation marks omitted).

[8] To the extent that EPA’s predictive judgment is

supported by substantial evidence in the record, it is entitled to deference, as “the applicable standard of review allows the EPA considerable latitude to exercise its expertise through reasoned projections.” Natural Res. Def. Council, Inc. v. EPA, 655 F.2d 318, 336 (D.C.Cir.1981); cf. Time Warner Entertainment Co. v. FCC, 240 F.3d 1126, 1133 (D.C.Cir.2001). EPA acknowledges that its Environmental Impact Analysis is based on incomplete data and thus cannot reasonably quantify the 2002 rule’s impact on public health. ENVIRONMENTAL IMPACT ANALYSIS at 4. Indeed, a General Accounting Office (“GAO”) Report to Congress stated that the economic and environmental impacts of the 2002 rule are “uncertain because of limited data and difficulty in determining how industrial companies will respond to the rule.” GAO, CLEAN AIR ACT: EPA SHOULD USE AVAILABLE DATA TO MONITOR THE EFFECTS OF ITS REVISIONS TO THE **NEW SOURCE REVIEW** PROGRAM 24 (2003) (“GAO REPORT”). GAO noted, for example, that because EPA lacked comprehensive data, it relied on industry anecdotes in concluding that NSR discourages sources from making changes that improve operating efficiency. *Id.* at 4. GAO further pointed out that EPA’s projection that these efficient changes will decrease actual emissions is based on the unverified assumption that sources will not increase their production levels after implementing the changes. *Id.* at 5. Nevertheless, GAO did not conclude that the 2002 rule lacked adequate evidentiary support. Rather, GAO recommended that EPA “monitor the emissions impacts of the rule” and “use the monitoring results to determine whether the rule has created adverse effects that the agency needs to address.” *Id.* at 25. In light of our vacatur of the Clean Unit and PCP portions of the 2002 rule, see *infra* Parts VI-VII, on which EPA relied in concluding that “collectively, the five NSR [provisions in the 2002 rule] will improve **\*31** **\*31** air quality,” ENVIRONMENTAL IMPACT ANALYSIS at 2, there is a heightened need for EPA to have sufficient data to confirm that the remaining portions of the 2002 rule do not result in increased emissions that harm air quality and public health. Indeed, EPA’s “necessarily wide latitude to make policy based on predictive judgments deriving from its general expertise implies a correlative duty to ascertain whether they work—that is, whether they actually produce the benefits [EPA] originally predicted they would.” Am. Family Ass’n v. FCC, 365 F.3d 1156, 1166 (D.C.Cir.2004) (quoting Bechtel v. FCC, 10 F.3d 875, 880 (D.C.Cir.1993)) (internal quotation marks omitted).

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[9][10] For now, it suffices to conclude that EPA's predictive judgment is entitled to deference. Incomplete data does not necessarily render an agency decision arbitrary and capricious, for "[i]t is not infrequent that the available data do not settle a regulatory issue, and the agency must then exercise its judgment in moving from the facts and probabilities on the record to a policy conclusion." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 52, 103 S.Ct. 2856; cf. *Time Warner*, 240 F.3d at 1133. Nor does the fact that "the evidence in the record may also support other conclusions ... prevent us from concluding that [the agency's] decisions were rational and supported by the record." See *Lead Indus. Ass'n v. EPA*, 647 F.2d 1130, 1160 (D.C.Cir.1980). EPA explained the available evidence and offered a "rational connection between the facts found and the choice made." *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168, 83 S.Ct. 239, 9 L.Ed.2d 207 (1962). Petitioners do not provide a basis for the court to conclude that EPA's choice of a ten-year lookback period is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 42 U.S.C. § 7607(d)(9).

#### IV. Methodology and Enforceability

Shifting from the baseline to the other half of the actual-to-projected-actual emissions calculation, we consider government and environmental petitioners' challenges to two features of the 2002 rule's projected-actual-emissions methodology: the exclusion from the emissions projection of any emissions due to increased demand and the "reasonable possibility" trigger for the rule's recordkeeping and reporting requirements.

##### A.

*Demand Growth Exclusion* Under the 2002 rule, in order to calculate whether a change will result in a significant emissions increase, sources other than utilities compare their baseline emissions (determined using the ten-year lookback period) to expected post-change emissions. The post-change emissions calculation excludes any emissions increases that "an existing unit could have accommodated during the consecutive 24-month period used to establish the baseline actual emissions ... and that are also unrelated to the particular project, including any increased utilization due to product demand growth." 67 Fed.Reg. at 80,277 (codified at 40 C.F.R. § 52.21(b)(41)(ii)(c)). Under the previous rule, only utilities could take advantage of this demand growth exclusion. 57 Fed.Reg. at 32,337; see also 67 Fed.Reg. at 80,202-03.

Government and environmental petitioners assert that in adopting the 2002 rule, EPA failed to address the fact that its 1998 NOA expressed provisional dissatisfaction with the demand growth exclusion. Characterizing the exclusion as a "departure from longstanding practice," EPA "tentatively concluded" in the NOA that the demand growth exclusion was "not appropriate and should not be continued, \*\*32 \*32 both as a general matter and especially in view of recent developments in the electric power sector." 63 Fed.Reg. at 39,860 (emphasis added). Because demand growth may be a "proximate cause" of physical or operational changes that might trigger NSR, EPA "seriously question[ed] whether market demand should ever be viewed as a significant factor ... since in a market economy, all changes in utilization-and hence, emissions-might be characterized as a response to market demand." *Id.*

[11] Contrary to petitioners' assertions, EPA did acknowledge these previous concerns when it adopted the 2002 rule. In the rule's preamble, EPA explained that "[b]oth the statute and implementing regulations indicate that there should be a causal link between the proposed change and any post-change increase in emissions." 67 Fed.Reg. at 80,203. To that end, the rule excludes demand growth, but only where it is "unrelated to the particular project." *Id.* at 80,277 (codified at 40 C.F.R. § 52.21(b)(41)(ii)(c)). Despite this tailored approach, government petitioners would have us bind EPA to its "tentative[ ]" 1998 conclusions. We know of no authority for this proposition, nor do petitioners cite any. To be sure, when a petitioner alleges inadequate notice and "the change between the proposed and final rule [is] an important one, we ... ask whether the final rule is a logical outgrowth of the proposed one." *Transmission Access Policy Study Group*, 225 F.3d at 729. Yet here, petitioners argue not that they received inadequate notice regarding the demand growth exclusion, but rather that EPA arbitrarily and capriciously changed its position regarding the exclusion's benefits. Central to notice-and-comment rulemaking is the ability of an agency to craft a final rule based on the comments of interested parties. EPA did just that.

Denying the petition for reconsideration of this issue, EPA explained, "While we projected that it would be difficult to separate demand growth increases from other increases resulting from a project, numerous industry commenters indicated that there are situations where the distinction clearly can be made," including "skyrocketing

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demand because the product becomes a fad; mishaps at a factory, causing production increases at remaining supplier sources; decrease in raw material prices; opening of new markets; and improved economic conditions.” RECONSIDERATION TSD at 18-19. Although petitioners urge us to ignore the comments on which EPA relied and to credit other comments that demand growth and a physical or operational change are inextricable, they give no reasons for weighting the latter more heavily than the former. In any event, “the question we must answer ... is not whether record evidence supports [petitioners'] version of events, but whether it supports [the agency's].” *Fla. Mun. Power Agency v. FERC*, 315 F.3d 362, 368 (D.C.Cir.2003) (noting that petitioner pointed to “some contradictory evidence” in the record). Here, as we have explained, EPA’s approach finds ample support in the record.

Next, environmental petitioners insist that the regulations create a per se exclusion for demand growth. Significantly, however, petitioners never challenge EPA’s interpretation of the statutory definition of modification—“any physical change in, or change in the method of operation of, a stationary source *which increases* the amount of any air pollutant emitted by such source or *which results* in the emission of any air pollutant not previously emitted,” 42 U.S.C. § 7411(a)(4) (emphasis added)—as requiring “a causal link **\*\*33 \*33** between the proposed change and any post-change increase in emissions.” See 67 Fed.Reg. at 80,203 (citing 40 C.F.R. § 52.21(b) (2)(i)). Instead, they say that the rule excludes “any increased utilization due to product demand growth,” even if unrelated to the change.

Petitioners misread the 2002 rule. The implementing regulations plainly allow exclusion of emissions that could have been accommodated during the baseline period and “that are also unrelated to the particular project.” 67 Fed.Reg. at 80,277 (codified at 40 C.F.R. § 52.21(b)(41)(ii)(c)). This latter category “includ[es] any increased utilization due to product demand growth.” See *id.* Thus, the regulation establishes two criteria a source must meet before excluding emissions from its projection: “(1) [t]he unit could have achieved the necessary level of utilization during the consecutive 24-month period [the source] selected to establish the baseline actual emissions; and (2) the increase is not related to the physical or operational change(s) made to the unit.” *Id.* at 80,203. As EPA further explained:

[E]ven if the operation of an emissions unit to meet a

particular level of demand could have been accomplished during the representative baseline period, but it can be shown that the increase is related to the changes made to the unit, then the emissions increases resulting from the increased operation must be attributed to the modification project, and cannot be subtracted from the projection of post-change actual emissions.

TSD at I-4-37.

Because EPA adequately explained its reasons for extending the demand growth exclusion to all industries so long as the growth is unrelated to the change, we will deny the petition for review of those provisions.

## B.

*Recordkeeping and Reporting Requirements.* Sources making physical or operational changes under the 2002 rule need not keep records unless they meet three criteria. First, sources must choose to project post-change emissions, instead of using the actual-to-potential test. 67 Fed.Reg. at 80,279 (codified at 40 C.F.R. § 52.21(r)(6)). Second, under the actual-to-projected-actual test, sources must determine they will not trigger NSR by significantly increasing their emissions. *Id.* Third, sources must nonetheless believe that there is a “reasonable possibility that [the] project ... may result in a significant emissions increase.” *Id.* Sources satisfying all three criteria must record the following information about the change:

- (a) A description of the project;
- (b) Identification of the emissions unit(s) whose emissions of a regulated NSR pollutant could be affected by the project; and
- (c) A description of the applicability test used to determine that the project is not a major modification for any regulated NSR pollutant, including the baseline actual emissions, the projected actual emissions, the amount of emissions excluded under [the demand growth exclusion] and an explanation for why such amount was excluded, and any netting calculations, if applicable.

*Id.* Additionally, sources meeting the three standards must, for each unit involved in the change, track post-change emissions and, depending on the nature of the

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change, retain the data for five or ten years. *See id.* (codified at 40 C.F.R. § 52.21(r)(6)(iii)). Significant increases as compared to the baseline must be reported to sources' reviewing authorities, *see id.* (codified at 40 C.F.R. § 52.21(r)(6)(v)), who **\*\*34 \*34** presumably would require such sources to undergo NSR.

By contrast, sources believing that no reasonable possibility of a significant emissions increase exists need keep no records at all—neither the data on which they based their projections nor records of actual emissions going forward. *See id.* (codified at 40 C.F.R. § 52.21(r)(6)). Government petitioners argue that by allowing sources to decide whether to keep records relating to a particular change, EPA has rendered the actual-to-projected-actual methodology unenforceable. How, they ask, will EPA ensure that sources are not escaping NSR if they are allowed to destroy the data crucial to that determination?

[12] Insisting that no enforceability problem exists, EPA argues that the 2002 rule *increases* recordkeeping requirements for non-utilities. Although it is technically correct that non-utilities were subject to less stringent recordkeeping requirements pre-2002, EPA's position ignores the major differences between the current and former methods. Prior to 2002, sources other than utilities evaluated post-change emissions under the more onerous actual-to-potential test, which presumed that sources would operate at their maximum post-change potential to emit. *See 57 Fed.Reg. at 32,336.* Given that assumption, sources' actual post-change emissions could not, by definition, exceed their potential-to-emit, making records of these actual emissions unnecessary for the purpose of ascertaining whether post-change emissions increased beyond expectations. Moreover, to avoid NSR, which is easily triggered under the actual-to-potential test, sources could opt to establish an enforceable emissions cap based on projected post-change actual emissions. TSD at I-4-7. Thus, under the pre-2002 regime, non-utilities either accepted the rigors of the actual-to-potential test, eliminating the need for recordkeeping, or subjected their actual emissions to monitoring by state permitting authorities. *See id.*

The flaw in EPA's position is further underscored by comparing the recordkeeping requirements of the pre-2002 actual-to-projected-actual emissions methodology—applicable only to utilities—to the current version. Previously, utilities whose projections included no significant emissions increase had to supply permitting

authorities with a minimum of five years of data to verify the projections' accuracy. *See 57 Fed.Reg. at 32,336.* Under the 2002 rule, by contrast, so long as sources foresee no “reasonable possibility” that changes may cause significant emissions increases, they have no obligation to retain the data underlying their projections, let alone send that information to permitting authorities. *See 67 Fed.Reg. at 80,279* (codified at 40 C.F.R. § 52.21(r)(6)).

Of course, one might wonder why sources with no “reasonable possibility” of significantly increased emissions should keep records at all. If EPA actually knew which sources had no “reasonable possibility” of triggering NSR, these sources would obviously have no need to keep records. The problem is that EPA has failed to explain how, absent recordkeeping, it will be able to determine whether sources have accurately concluded that they have no “reasonable possibility” of significantly increased emissions. We recognize that less burdensome requirements may well be appropriate for sources with little likelihood of triggering NSR, but EPA needs to explain how its recordkeeping and reporting requirements allow it to identify such sources.

EPA argues that “[t]here will be many cases where there will be a reasonable possibility that a significant increase will occur, and the 2002 rule imposes new **\*\*35 \*35** recordkeeping requirements in those circumstances.” Br. for Resp't at 99. Although this is certainly true, and although it is also true that sources failing to “maintain records in that situation ... will have violated the recordkeeping requirements of the NSR Rule,” *id.*, EPA misses the point. As petitioners emphasize, the rule allows sources that take advantage of the “reasonable possibility” standard to avoid recordkeeping altogether, thus thwarting EPA's ability to enforce the NSR provisions.

According to EPA, “the existence of vigorous enforcement demonstrates that EPA is willing and able to enforce its rules and that facilities have an incentive to be accurate in how they determine whether NSR applies.” *Id.* at 101. To be sure, the record reveals a willingness to act against NSR violators, *see* Carol M. Browner, Adm'r, Env'tl. Protection Agency, Remarks Prepared for Delivery at Clean Air Enforcement Press Conference (Nov. 3, 1999), but EPA never explains how it can continue such enforcement efforts with respect to sources which, believing no reasonable possibility of a significant emissions increase exists, keep no data by which the

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agency could prove an NSR transgression. Acknowledging as much in its response to comments about the demand growth exclusion, EPA noted that it is “very important that the source retain a record of all information available to support its initial claim” to an exclusion because “[t]his information may be required by the reviewing authority.” TSD at I-5-44.

At oral argument, EPA counsel asserted that under the reasonable possibility standard, enforcement authorities could conduct inspections and request information. Although conceding that nothing in the record addressed how authorities could access data through these mechanisms once a source had failed to keep records, counsel maintained that the methodology is enforceable simply because such actions are “inherent” in EPA’s enforcement authority. EPA certainly has such inherent enforcement authority, but even inherent authority depends on evidence.

EPA tells us that the reporting requirements of the CAA’s Title V and state minor NSR programs will provide the information enforcement authorities need. But EPA fails to explain how emissions reported under Title V can be traced to a particular physical or operational change. Moreover, reliance on state programs to establish minimum recordkeeping and reporting standards means that states unwilling to impose stricter rules are free to retain the 2002 rule’s approach—a prospect we find unacceptable given our concerns with EPA’s explanation of the methodology’s enforceability.

Finally, we agree with government petitioners that the intricacies of the actual-to-projected-actual methodology will aggravate the enforcement difficulties stemming from the absence of data. The methodology mandates that projections include fugitive emissions, malfunctions, and start-up costs, and exclude demand growth unrelated to the change. *See* 67 Fed.Reg. at 80,246. Each such determination requires sources to predict uncertain future events. By understating projections for emissions associated with malfunctions, for example, or overstating the demand growth exclusion, sources could conclude that a significant emissions increase was not reasonably possible. Without paper trails, however, enforcement authorities have no means of discovering whether the exercise of such judgment was indeed “reasonable.”

Because EPA has failed to explain how it can ensure NSR compliance without the relevant data, we will remand for

it either to provide an acceptable explanation for its **\*\*36** “reasonable possibility” standard or to devise an appropriately supported alternative.

## V. Plantwide Applicability Limitations

To afford sources the flexibility to respond rapidly to market changes and to eliminate the administrative burdens of “netting out” of NSR under the 1980 rule, the 2002 rule establishes an alternative method for assessing “increases” in emissions. *See id.* at 80,206-07. Under this method, a change does not “increase” net emissions and thus does not trigger NSR as long as source-wide emissions remain below the Plantwide Applicability Limitation (“PAL”) specified in the source’s PAL permit. *See id.* at 80,207. The PAL is calculated by adding a “significant” margin to the baseline actual emissions from any two-year period within the ten-year period immediately preceding the permit application. *See id.* at 80,285 (codified at 40 C.F.R. § 52.21(aa)(6)). The PAL permit is effective for ten years, *see id.* at 80,286 (codified at 40 C.F.R. § 52.21(aa)(8)(i)), and may be renewed prior to the expiration of the initial ten-year term, *see id.* at 80,287 (codified at 40 C.F.R. § 52.21(aa)(10)). With the PAL option comes various monitoring and recordkeeping requirements. *See id.* at 80,287-89 (codified at 40 C.F.R. § 52.21(aa)(12)). The source must employ a “monitoring system that accurately determines plantwide emissions of the PAL pollutant,” *id.* at 80,287 (codified at 40 C.F.R. § 52.21(aa)(12)(i)(a)), using one of four specified methods, *see id.* at 80,287-88 (codified at 40 C.F.R. § 52.21(aa)(12)(i)(b), (ii)). The monitoring system must be approved by EPA, *see id.* at 80,287 (codified at 40 C.F.R. § 52.21(aa)(12)(i)(b)), and revalidated every five years, *see id.* at 80,288 (codified at 40 C.F.R. § 52.21(aa)(12)(ix)). The source must keep “all records necessary to determine compliance” with the PAL permit, “including a determination of each emission unit’s 12-month rolling total emissions.” *Id.* (codified at 40 C.F.R. § 52.21(aa)(13)(i)). In addition, the source must submit to EPA “semi-annual monitoring reports” and “prompt deviation reports.” *Id.* (codified at 40 C.F.R. § 52.21(aa)(14)).

[13] Government and environmental petitioners contend that, like the ten-year lookback period, the PAL provision is arbitrary and capricious because it allows sources to increase their emissions beyond their most recent levels without triggering NSR. These contentions fail for the same reasons that petitioners’ challenges to the ten-year

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lookback period fail. *See supra* Part III. Environmental petitioners also challenge the validity of the ten-year PAL term and the environmental impact of PALs, but they fail to demonstrate that PALs are based on an impermissible statutory interpretation or are otherwise arbitrary and capricious.

The CAA is silent on how to calculate emissions increases, and both the Supreme Court in *Chevron* and this court in *Alabama Power* acknowledged that EPA has the authority to define “increases” in terms of source-wide emissions. *See Chevron*, 467 U.S. at 859-66, 104 S.Ct. 2778; *Alabama Power*, 636 F.2d at 400-03. Indeed, environmental petitioners do not challenge EPA’s authority to establish a PAL program. Instead, they contend that the ten-year PAL term violates the contemporaneity requirement of *Alabama Power* because it allows sources to “net out” of NSR based on decreases in emissions that occur outside the five-year contemporaneity period established in the 1980 rule. *See* 45 Fed.Reg. at 52,736 (codified at 40 C.F.R. § 52.21(b)(3)(ii)). EPA contends that PALs are not subject to the \*\*37 \*37 contemporaneity requirement because they measure source-wide emissions and do not rely on the netting of emissions from individual units. *See* 67 Fed.Reg. at 80,215. This distinction is artificial, however, because source-wide emissions are nothing but the net emissions from all of the individual units in the source. *See id.* at 80,216. Indeed, EPA agrees that “[o]ne way of viewing a PAL is to focus on the increases and decreases at individual emissions units that, taken together, result in the net emissions from [the] source as a whole.... Viewed from this perspective, the term of the PAL constitutes the ‘contemporaneous’ period.” *Id.*

Still, EPA has “discretion, within reason, to define which changes are substantially contemporaneous.” *Alabama Power*, 636 F.2d at 402. To promote administrative efficiency, EPA decided to align the PAL permit process with the Title V permit process for existing sources, which occurs every five years. *See* 67 Fed.Reg. at 80,219. However, recognizing that “setting a PAL can be a complex and time consuming process,” *id.* at 80,216, EPA determined that five years would not provide “a sufficient period of regulatory certainty” to induce sources to expend the “initial commitment of substantial resources” necessary to establish a PAL, *id.* at 80,219. In establishing the PAL term, EPA sought to provide both “an appropriate time of regulatory certainty” and “a sufficient period of time for planning long-term capital improvements.” *Id.* EPA initially chose a five-year

contemporaneity period in the 1980 rule because “five years is frequently used as the time duration over which corporate expansion planning is conducted.” 45 Fed.Reg. at 52,701. But as EPA explained in the preamble to the 2002 rule, its business cycle study concluded that a ten-year period was necessary “to ensure that the normal business cycle would be captured generally for any industry.” 67 Fed.Reg. at 80,216. Thus, EPA chose a ten-year PAL term “in an effort to balance the need for regulatory certainty, the administrative burden, and a desire to align the PAL renewal with the title V permit renewal.” *Id.* at 80,219. This policy choice is entitled to deference because it involves a balancing of the environmental, economic, and administrative goals of the CAA, *see Chevron*, 467 U.S. at 864-66, 104 S.Ct. 2778, that environmental petitioners fail to demonstrate is impermissible under the CAA.

As part of its Environmental Impact Analysis, EPA examined six pilot projects implementing flexible permits similar to PALs. *See* ENVIRONMENTAL IMPACT ANALYSIS app. A-B. The participants in these pilot projects reduced their emissions by 27% to 83% below their PAL levels. *Id.* app. B at 2. Based on these results, EPA concluded that PALs encourage sources to reduce their emissions voluntarily in order to “create enough headroom for future expansions” during the PAL term. 67 Fed.Reg. at 80,207; *see* ENVIRONMENTAL IMPACT ANALYSIS app. B at 1. EPA projected that “PALs will over time tend to shift growth in emissions to cleaner units, because the growth will have to be accommodated under the PAL cap.” 67 Fed.Reg. at 80,207. EPA also found that PALs encourage sources to implement physical or operational changes that improve efficiency and reduce emission rates by reducing the “administrative friction” associated with making such changes. *Id.* (internal quotation marks omitted); *see* ENVIRONMENTAL IMPACT ANALYSIS app. A at 4-5. Observing that none of the participants in the pilot projects exceeded their emissions caps or violated their monitoring requirements, EPA concluded that “flexible permit provisions (for example, emissions caps) are enforceable as a practical matter” by using the types of monitoring systems required \*\*38 \*38 by the 2002 rule. 67 Fed.Reg. at 80,207; *see* ENVIRONMENTAL IMPACT ANALYSIS app. A at 15-18. EPA further noted that even if sources do not voluntarily reduce their emissions, PALs still benefit the environment by accounting for “insignificant” emissions increases that currently escape NSR. *See* 67 Fed.Reg. at 80,206; ENVIRONMENTAL IMPACT ANALYSIS app. B at 4. Under the default method for calculating emissions

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increases, increases that do not reach a “significant” level do not trigger NSR, even if they are significant in the aggregate. *See* 40 C.F.R. §§ 52.21(a)(2)(iv)(a), 52.21(b)(23). The PAL provision of the 2002 rule ensures that such increases count toward source-wide emissions and can trigger NSR if they exceed the PAL level. *See* ENVIRONMENTAL IMPACT ANALYSIS app. B at 4. While EPA acknowledged that it could not quantify the “aggregate environmental impacts of these small emissions increases, or the benefit that would arise from capping them,” it estimated that “such benefits would be potentially large.” *Id.* at 4-5.

Environmental petitioners fail to refute EPA's assessment of the environmental benefits of PALs. They point out that the pilot projects relied on lookback periods and permit terms shorter than ten years, and they contend that under the 2002 rule, sources have no incentive to reduce their emissions because the ten-year lookback period allows them to set their PALs high enough to accommodate future increases without any initial decreases. They also contend that under the 2002 rule, both significant and insignificant emissions increases will escape NSR because sources can set their PALs far above recent actual emissions. However, as discussed in Part III, EPA expects the ten-year lookback period to affect only a small percentage of sources. *See supra* Part III (citing ENVIRONMENTAL IMPACT ANALYSIS app. F). Therefore, EPA assumes that most sources will set their PALs equal to recent baseline actual emissions. *See* ENVIRONMENTAL IMPACT ANALYSIS app. B at 1-2. Based on this assumption, EPA “conservatively” estimates that sources will reduce their emissions by 10% to 33% below their PAL levels. *Id.* app. B at 3. State intervenors maintain that their own experience implementing the NSR program confirms EPA's conclusions.

Accordingly, the court must defer to EPA's assessment of the environmental benefits of PALs, which is based on the agency's expert evaluation of technical data from the pilot projects. *See Huls Am., Inc. v. Browner*, 83 F.3d 445, 452 (D.C.Cir.1996). Therefore, we uphold the PAL provision of the 2002 rule, 67 Fed.Reg. at 80,284-89 (codified at 40 C.F.R. § 52.21(aa)), as a reasonable exercise of EPA's authority under the CAA.

## VI. Clean Units

To maximize source flexibility and to encourage sources

to install state-of-the-art pollution control technology, the 2002 rule establishes “an innovative approach to NSR applicability” that measures “increases” in terms of “Clean Unit” status instead of actual emissions. 67 Fed.Reg. at 80,222. Under this approach, a change does not “increase” emissions and thus does not trigger NSR as long as it does not alter the unit's Clean Unit status, even if the change increases the source's net actual emissions. *Id.* A unit automatically qualifies for Clean Unit status if it has installed “state-of-the-art” pollution control technology (LAER or BACT) as a result of major NSR within the last ten years. *See id.* at 80,279-80 (codified at 40 C.F.R. § 52.21(x)(3)). A unit that has not undergone major NSR can also qualify for Clean Unit status if it demonstrates that its pollution control technology is “comparable” to LAER or BACT and that its allowable **\*\*39 \*39** emissions will not violate national ambient air quality standards or new source performance standards. *See id.* at 80,281-83 (codified at 40 C.F.R. § 52.21(y)). A unit retains its Clean Unit status for ten years, *see id.* at 80,280 (codified at 40 C.F.R. § 52.21(x)(5)), and may renew its Clean Unit status upon expiration, *see id.* (codified at 40 C.F.R. § 52.21(x)(3)), as long as it complies with the emissions limitations and work practice requirements in its NSR permit, *see id.* at 80,281 (codified at 40 C.F.R. § 52.21(x)(7)).

[14] Government and environmental petitioners contend that the Clean Unit provision contravenes the plain meaning of the CAA because it measures “increases” in terms of Clean Unit status instead of actual emissions. EPA's response is that, because the CAA “is silent on whether increases in emissions for purposes of determining whether a physical or operational change constitutes a modification must be measured in terms of actual emissions, potential emissions, or some other currency,” *id.* at 80,228, its interpretation of the ambiguous term “increases” is entitled to deference under *Chevron* Step 2. Upon employing “traditional tools of statutory interpretation” under *Chevron* Step 1 to ascertain whether “Congress had an intention on the precise question at issue,” *Chevron*, 467 U.S. at 843 n. 9, 104 S.Ct. 2778, we conclude that the CAA unambiguously defines “increases” in terms of actual emissions, *cf. supra* Part II.

[15][16] It is a “cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.” *TRW Inc. v. Andrews*, 534 U.S. 19, 31, 122 S.Ct. 441, 151

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L.Ed.2d 339 (2001) (quoting Duncan v. Walker, 533 U.S. 167, 174, 121 S.Ct. 2120, 150 L.Ed.2d 251 (2001)) (internal quotation marks omitted). Moreover, “when Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” Barnhart v. Sigmon Coal Co., 534 U.S. 438, 452, 122 S.Ct. 941, 151 L.Ed.2d 908 (2002) (quoting Russello v. United States, 464 U.S. 16, 23, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983)) (internal quotation marks omitted).

In the 1977 amendments to the CAA, Congress defined “major emitting facilit[ies]” as “stationary sources of air pollutants which *emit*, or have the *potential to emit*, one hundred tons per year or more of any air pollutant.” 42 U.S.C. § 7479(1) (emphasis added). The juxtaposition of the terms “emit” and “potential to emit” indicates that when Congress enacted the NSR program in 1977, it was conscious of the distinction between actual and potential emissions, using the term “emit” to refer to actual emissions and the term “potential to emit” to refer to potential emissions. Indeed, the court stated in Alabama Power that the use of the term “emit,” as opposed to “potential to emit,” is a “reference to some measure of actual emissions.” 636 F.2d at 353.

Similarly, in the same section of the 1977 amendments to the CAA, Congress defined “best available control technology” as “an *emission limitation* based on the maximum degree of reduction of each pollutant ... *emitted* from any major emitting facility.” 42 U.S.C. § 7479(3) (emphasis added). Again, the juxtaposition of the terms “emission limitation” and “emitted” indicates that Congress was conscious of the distinction between actual and allowable emissions, using the term “emitted” to refer to actual emissions and the term “emission limitation” to refer to allowable emissions.

**\*40 \*\*40** In the same section of the 1977 amendments to the CAA, Congress applied NSR to “the modification (as defined in section 7411(a) of this title) of any source or facility.” 42 U.S.C. § 7479(2)(C). Section 7411(a) defines a “modification” as any physical or operational change that “increases the amount of any air pollutant *emitted* by [the] source.” 42 U.S.C. § 7411(a)(4) (emphasis added). As noted, when Congress enacted the 1977 amendments to the CAA, it distinguished between actual, potential, and allowable emissions. If Congress had intended for “increases” in emissions to be measured in terms of potential or allowable emissions, it would have added a

reference to “potential to emit” or “emission limitations.” The absence of such a reference must be given effect. *See Barnhart*, 534 U.S. at 452, 122 S.Ct. 941; *TRW*, 534 U.S. at 33, 122 S.Ct. 441. Moreover, even if the word “emitted” does not by itself refer to actual emissions, the phrase “the *amount* of any air pollutant *emitted* by [the] source” plainly refers to actual emissions. 42 U.S.C. § 7411(a)(4) (emphasis added). EPA itself came to the same conclusion in the preamble to the 1980 rule. *See* 45 Fed.Reg. at 52,700.

Therefore, because the plain language of the CAA indicates that Congress intended to apply NSR to changes that increase actual emissions instead of potential or allowable emissions, we hold that EPA lacks authority to promulgate the Clean Unit provision, and we vacate that portion of the 2002 rule, 67 Fed.Reg. at 80,279-83 (codified at 40 C.F.R. § 52.21(x)), as contrary to the statute under *Chevron* Step 1.

## VII. Pollution Control Projects

[17] In an effort to remove a “regulatory disincentive that might otherwise prevent industry from undertaking pollution control and prevention measures,” *id.* at 80,232, the 2002 rule exempts “environmentally beneficial” pollution control projects (“PCPs”) from NSR by excluding them from the definition of “modification.” *See id.* at 80,275-76, 80,283-84 (codified at 40 C.F.R. §§ 52.21(b)(2)(iii)(h), 52.21(b)(32), 52.21(z)). Under the 2002 rule, a PCP that reduces emissions of a “primary” pollutant but increases emissions of a “collateral” pollutant is not a physical or operational “change” subject to NSR if its net effect is “environmentally beneficial.” *Id.* at 80,232-33. EPA adopted a similar exemption for PCPs undertaken by electric utilities in the 1992 rule. *See* 57 Fed.Reg. at 32,336-37 (codified as amended at 40 C.F.R. §§ 52.21(b)(2)(iii)(h), 52.21(b)(32)).

Environmental petitioners contend that these exemptions violate the language of the CAA because PCPs plainly are physical or operational “changes” that increase emissions of collateral pollutants. EPA concedes that PCPs are “changes” in the literal sense but contends that “Congress did not intend that PCPs be considered the type of activity that should trigger NSR.” 67 Fed.Reg. at 80,238 (quoting 57 Fed.Reg. at 32,319). Because EPA fails to present evidence of such congressional intent, the plain meaning of the statute is conclusive. *See United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989); *Engine Mfrs. Ass’n v. EPA*, 88 F.3d

413 F.3d 3, 60 ERC 1791, 367 U.S.App.D.C. 3, 35 Env'tl. L. Rep. 20,135  
(Cite as: 413 F.3d 3, 367 U.S.App.D.C. 3)

1075, 1088-89 (D.C.Cir.1996).

EPA points to nothing in the legislative history to support its view of congressional intent other than the fact that when Congress created the NSR program in 1977, it incorporated the statutory definition of “modification” from the NSPS program, which EPA regulations at the time had interpreted as excluding certain PCPs. *See* 40 Fed.Reg. at 58,419 (codified at 40 C.F.R. § 60.14(e)(5)). But for reasons explained\*\*41 \*41 above, nothing indicates that Congress intended to incorporate preexisting NSPS regulations into the NSR program. *See supra* Part II.

EPA's only other support for the PCP exemption is its view that it would be “absurd” for Congress to discourage PCPs by subjecting them to NSR. But there is nothing inherently “absurd” about increasing the regulatory cost of projects that increase collateral emissions, and EPA does not demonstrate otherwise. Congress could reasonably conclude, for example, that tradeoffs between pollutants are difficult to measure, and thus any significant increase in emissions of any pollutant should be subject to NSR. In any event, a bare assertion of absurdity cannot overcome the plain meaning of a statute: “there must be evidence that Congress meant something other than what it literally said before a court can depart from plain meaning.” *See Engine Mfrs. Ass'n*, 88 F.3d at 1088.

Environmental petitioners contend that the context and legislative history of the statutory definition of “modification” support a plain reading of the term “change.” Essentially, they maintain that if Congress intended to exempt “environmentally beneficial” PCPs from NSR, it would have done so explicitly, as it did for clean coal technology, *see* 42 U.S.C. § 7651n, and for PCPs in extreme nonattainment areas, *see id.* § 7511a(e)(2). One of the environmental petitioners argued during the comment period on the proposed rule that “[n]othing in the statute or its legislative history suggests an intent to authorize a blanket exclusion of pollution control projects,” citing § 7511a(e)(2) as an example of how Congress expressly creates an exemption when it intends to do so. Statement of David G. Hawkins, Natural Res. Def. Council 12 (July 19, 1991). We note that both § 7511a(e)(2) and § 7651n were enacted in 1990, and “the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.” *PDK Labs. Inc. v. U.S. Drug Enforcement Admin.*, 362 F.3d 786, 794 (D.C.Cir.2004) (quoting *United States v. Price*, 361 U.S.

304, 313, 80 S.Ct. 326, 4 L.Ed.2d 334 (1960)) (internal quotation marks omitted). Nevertheless, the point remains that Congress did not expressly authorize EPA to create regulatory exemptions to NSR.

EPA's only response is that “[t]here is no reason to conclude that, solely by creating the clean coal exemption, Congress somehow precluded EPA from crafting a broader regulatory exemption from pollution control projects in general.” Br. for Resp't at 120. Absent clear congressional delegation, however, EPA lacks authority to create an exemption from NSR by administrative rule. *See Sierra Club v. EPA*, 129 F.3d 137, 140 (D.C.Cir.1997). Indeed, “this court has consistently struck down administrative narrowing of clear statutory mandates.” *Id.*

Moreover, environmental petitioners point to legislative history suggesting that Congress rejected a broad PCP exemption: in enacting the NSPS program Congress rejected one version of the statute that defined “modification” to exclude “pollution abatement facilities.” S. REP. NO. 91-1196 (1970), U.S.Code Cong. & Admin.News 1976, p. 5908. Even assuming, as EPA contends, that this legislative history does not reflect a “permanent rejection” of a PCP exemption, Br. for Resp't at 120 n. 67 (internal quotation marks omitted), EPA points to nothing in the legislative history indicating that Congress intended to authorize EPA to create such an exemption.

Therefore, we hold that EPA lacks authority to create PCP exemptions from NSR, and we vacate those parts of the 1992 and 2002 rules, 57 Fed.Reg. at 32,336\*\*42 \*42 67 Fed.Reg. at 80,275-76, 80,283-94 (codified at 40 C.F.R. §§ 52.21(b)(2)(iii)(h), 52.21(b)(32), 52.21(z)), as contrary to the statute.

### VIII. State and Local Authority

Government petitioners (various states, municipalities, and pollution regulatory authorities) advance several additional challenges to the 2002 rule, two substantive and one procedural. Substantively, the governments allege that the 2002 rule violates section 116 of the Act, which preserves state authority to adopt alternative pollution standards or limitations, except that state standards may not be “less stringent” than EPA standards or limitations. *See* 42 U.S.C. § 7416. The governments assert that the 2002 rule unlawfully precludes states from

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adopting more stringent criteria. They also argue that the 2002 rule violates the anti-backsliding provision of the Act, which disables EPA from relaxing requirements in effect in nonattainment areas before November 15, 1990 (the date of the 1990 amendments' adoption). *See id.* § 7515. We find both claims unripe.

Finally, government petitioners urge that EPA failed to give adequate notice that it might adopt a rule not giving states authority to pick and choose among the innovations from the prior rule, and that the rule adopted was not a “logical outgrowth” of the noticed proposals. We reject this challenge; EPA provided adequate notice in the initial proposal.

#### A.

[18] *Alternative NSR Standards*. Section 116 of the Act, 42 U.S.C. § 7416, provides that states and localities may adopt provisions as part of a SIP that deviate from those required for SIPs by EPA, *unless* the state or local provision is “less stringent” than the EPA provision. *See also* 40 C.F.R. § 51.166(a)(7)(iv) (calling for EPA approval of deviant NSR SIPs that are “more stringent than or at least as stringent in all respects” as the corresponding EPA provision). EPA concluded that the elements of the 2002 rule would work better and be more environmentally beneficial if implemented together. 67 Fed.Reg. at 80,241. Government petitioners argue that because EPA adopted the elements of the 2002 rule as “minimum” requirements, EPA has precluded approval of more stringent SIPs.

Government petitioners' reading of the regulations is hardly chimerical. The preamble said that “[t]o be approvable under the SIP, State and local agency programs implementing part C (PSD permit program in § 51.166) or part D (nonattainment NSR permit program in § 51.165) *must include* today's changes as minimum program elements.” *Id.* at 80,240 (emphasis added). But other portions of the preamble suggest a good deal of wiggle room. EPA later asserted that “even without the menu approach [which would have allowed selective rather than wholesale adoption], State and local jurisdictions have significant freedom to customize their NSR programs. Ever since our current NSR regulations were adopted in 1980, we have taken the position that States may meet the requirements of part 51 with different but equivalent regulations.” *Id.* at 80,241/2 (internal quotation marks omitted). It also explained that states simply adopting the EPA provisions could expect quick

SIP approval, while a state not doing so would need to show that its alternative was “at least as stringent” as the federal requirement. *Id.* The text of 40 C.F.R. § 51.166(a)(7)(iv), quoted above, similarly indicates the permissibility of “more” or “equally” stringent provisions. Government petitioners insist that the choice offered is illusory, but until EPA has rejected\*\*\*43 \*43 a newly submitted SIP, we think the issue is unripe.

The seemingly contradictory statements in the preamble leave some uncertainty about how EPA will treat SIPs that differ from the substance of the 2002 rule, and thus suggest that the governments' issue is now unfit for review. *See Abbott Labs.*, 387 U.S. at 148, 87 S.Ct. 1507. Apart from the ambiguity in the preamble itself, EPA counsel said at oral argument that EPA would consider SIPs that do not contain the five elements of the 2002 rule. *See Oral Arg. Tr.* at 169-72. As EPA pointed out in the rulemaking itself, no state SIP proposals were under review in the rulemaking. RECONSIDERATION TSD at 73. Unlike *Whitman v. American Trucking Ass'n*, 531 U.S. 457, 121 S.Ct. 903, 149 L.Ed.2d 1 (2001), review would take place before “EPA has concluded its consideration of the implementation issue,” *id.* at 479, 121 S.Ct. 903.

The governments assert that delay in review inflicts hardship, *see Abbott Labs.*, 387 U.S. at 148, 87 S.Ct. 1507, and note that in *American Trucking* the Court found the time and expense of preparing new SIPs an adequate hardship, 531 U.S. at 479, 121 S.Ct. 903. But if the elements of the 2002 rule *are* “less stringent” than the superseded ones, as the governments allege, then on their own reasoning existing SIPs would necessarily be “at least as stringent” as those required by the new rules. Indeed, as the governments offer no hypotheticals of *new* provisions that they might adopt, simple resubmission of an existing plan for EPA approval would (if rejected) present their challenge in a plainly justiciable form, imposing neither the hardship of developing new plans nor sacrifice of any as-yet apparent state policy preference. Even if governments elect to develop new plans rather than submit existing plans, the fitness and hardship calculation differs from that in *American Trucking*, as the issue posed here is far less fit for review than the outright statutory issue presented there. Thus the hardship from deferring review seems small in relation to the risks of premature judicial entanglement in what may yet prove to be a hypothetical issue.

#### B.

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[19] *Anti-backsliding*. Section 193 of the Act, a so-called anti-backsliding provision, bars EPA from altering any control requirement in effect prior to November 15, 1990 in an area that is a nonattainment area for an air pollutant, unless the revision “insures equivalent or greater emission reductions of such air pollutant.” See 42 U.S.C. § 7515. (We assume arguendo that section 193 applies to changes in the regulatory definition of “modification” for NSR purposes.) Government petitioners argue that because the new rules in some respects diminish the likelihood of NSR, they must flunk the “greater or equivalent emission reductions” test. See Br. for Gov’t Pet’rs at 22. The record itself contains conflicting assertions. Compare EIP REPORT at 1-2 (projecting potential emissions increases in all twelve of twelve states studied), with ENVIRONMENTAL IMPACT ANALYSIS at 3 (noting difficulty of quantifying environmental benefits, but concluding that the new rule will not cause net environmental harm). The environmental effects of less sweeping NSR are ambiguous: more sweeping NSR will tend to assure improved emissions controls on qualifying “modifications,” but may also deter change and thereby preserve firms’ use of older, dirtier technologies. We are in no position to say which effects predominate here. This is particularly true since today’s invalidation of portions of the new rule may affect its overall environmental impact as compared to the old rule. See \*\*44 \*44 ENVIRONMENTAL IMPACT ANALYSIS at 3. Until an adequate factual record is developed, as might occur in the course of a state’s quest for approval of a SIP meeting the old criteria or in some other context, the claim appears at best unripe.

### C.

[20] *Notice re Menu of Alternatives*. EPA in 1996 proposed a “menu of alternatives” approach by which governments would be allowed to choose any or all of the new program elements, but would not be required to adopt any. See 61 Fed.Reg. at 38,251; see also 67 Fed.Reg. at 80,241. In the final rule, however, EPA elected not to implement the menu approach, choosing instead to adopt the new elements as part of a mandatory package (subject to the exception for more stringent requirements). 67 Fed.Reg. at 80,241/1. Government petitioners urge that the ultimate choice was not a “logical outgrowth” of EPA’s initial proposal, and was thus invalid for want of adequate notice. And, as EPA had without discussion rejected petitioners’ request for reconsideration

on the subject, petitioners argue that at a minimum we should remand the case for such reconsideration.

Given that the status quo ante did not involve a menu of options, there were two readily foreseeable outcomes that could result from the proposal. Either the menu of options approach would be adopted or it would not. “One logical outgrowth of a proposal is surely, as EPA says, to refrain from taking the proposed step.” *Am. Iron & Steel Inst. v. EPA*, 886 F.2d 390, 400 (D.C.Cir.1989).

The governments also say, quoting our decision in *Horsehead Resource Development Co. v. Browner*, 16 F.3d 1246, 1268 (D.C.Cir.1994), that “the component parts [of the rule] were never collected together in such a fashion” as to enable them to anticipate and adequately comment on the ultimate rule. But whereas in *Horsehead* the notice called for data in a way that gave little clue as to their ultimate use, *id.*, petitioners point to no such mystification here. Indeed, EPA received extensive comments on all aspects of the rule, including whether to integrate the elements into a set of minimum NSR program requirements. See RECONSIDERATION TSD at 75. We find no inadequacy of notice.

### IX. Conclusion

Accordingly, we deny the petitions of government, environmental, and industry petitioners except as follows: we vacate the provisions of the 2002 rule regarding the Clean Unit applicability test and Pollution Control Projects; we remand the recordkeeping provisions to EPA either to provide an acceptable explanation for its “reasonable possibility” standard or to devise an appropriately supported alternative; and we dismiss in part the petitions of government and industry petitioners as unripe.

STEPHEN F. WILLIAMS, Senior Circuit Judge, concurring.

I join the opinion for the court. We remand the recordkeeping and reporting elements of the 2002 rule because of EPA’s failure to explain its decisions on these elements. Maj. Op. at 33-36. As I understand the remand, the agency’s obligation is to analyze the trade-off between compliance improvement and the burdens of data collection and reporting. In making its choice on some specific degree and type of collection and reporting, it must articulate a reasoned judgment as to why any proposed additional burden would not be justifiable in terms of the likely enhancement of compliance. It need

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not show that the system chosen will achieve perfect NSR compliance-a showing that I \*\*45 \*45 do not believe we could lawfully demand. Perfection is often too costly to be sensible.

On a broader note, this case illustrates some of the painful consequences of reliance on command-and-control regulation in a world where emission control is typically far more expensive, per unit of pollution, when accomplished by retrofitting old plants than by including state-of-the-art control technology in new ones. In the interests of reasonable thrift, such regulation inevitably imposes more demanding standards on the new. But that provides an incentive for firms to string out the life of old plants. Indefinite plant life is impossible without modifications, however, so the statute conditions modifications on the firm's use of technological improvements. This in turn replicates the original

dilemma: a broad concept of modification extends both the scope of the mandate for improved technology and the incentive to keep the old. By contrast, emissions charges or marketable pollution entitlements provide incentives for firms to use-*at any and every plant*-all pollution control methods that cost less per unit than the emissions charge or the market price of an entitlement, as the case may be.

C.A.D.C.,2005.  
New York v. U.S. E.P.A.  
413 F.3d 3, 60 ERC 1791, 367 U.S.App.D.C. 3, 35 Env'tl. L. Rep. 20,135

END OF DOCUMENT

**To:** DeLuca, Isabel[DeLuca.Isabel@epa.gov]; Millett, John[Millett.John@epa.gov]  
**From:** Gunasekara, Mandy  
**Sent:** Thur 3/8/2018 10:20:49 PM  
**Subject:** NSR Press Release  
Project Netting Press Release\_DRAFT 2018 03 08.docx

Attached is the latest iteration of the NSR PEA Memo Press Release. I just sent a copy to Liz.

**Mandy M. Gunasekara**

Principal Deputy Assistant Administrator

Office of Air and Radiation

US Environmental Protection Agency

**To:** Bodine, Susan[bodine.susan@epa.gov]  
**From:** Gunasekara, Mandy  
**Sent:** Thur 12/7/2017 5:06:15 PM  
**Subject:** NSR Memo  
NSR policy memo\_FINAL for Admin Signature 2017 12 07.docx

Attached is final. Circling back on this -

**Ex. 5 - Deliberative Process**

# **Ex. 5 - Deliberative Process**

**Mandy M. Gunasekara**

Principal Deputy Assistant Administrator

Office of Air and Radiation

US Environmental Protection Agency

**To:** Hope, Brian[Hope.Brian@epa.gov]; White, Elizabeth[white.elizabeth@epa.gov]  
**From:** Gunasekara, Mandy  
**Sent:** Thur 12/7/2017 4:58:17 PM  
**Subject:** RE: Memo  
NSR policy memo FINAL for Admin Signature 2017 12 07.OEX REV.docx

Attached with final edit. All I did was delete the contact information at the end. This is good. Thankyou!

-----Original Message-----

From: Hope, Brian  
Sent: Thursday, December 7, 2017 11:50 AM  
To: White, Elizabeth <white.elizabeth@epa.gov>; Gunasekara, Mandy <Gunasekara.Mandy@epa.gov>  
Subject: RE: Memo

Attached. Thanks!  
- Brian

Brian T. Hope  
Deputy Director  
Office of the Executive Secretariat  
Office of the Administrator  
(202) 564-8212

-----Original Message-----

From: White, Elizabeth  
Sent: Thursday, December 07, 2017 11:48 AM  
To: Gunasekara, Mandy <Gunasekara.Mandy@epa.gov>  
Cc: Hope, Brian <Hope.Brian@epa.gov>  
Subject: RE: Memo

Mandy - Brian can send you the document we are working off of and you can make your edits there.

Beth

Beth White  
Director, Office of the Executive Secretariat U.S. Environmental Protection Agency  
(202) 564-1781 direct  
(202) 816-1701 cell

-----Original Message-----

From: Gunasekara, Mandy  
Sent: Thursday, December 7, 2017 11:32 AM  
To: White, Elizabeth <white.elizabeth@epa.gov>  
Subject: Memo

I have two minor edits! Can you wait for me to send the updated memo?

Sent from my iPhone

**To:** Bodine, Susan[bodine.susan@epa.gov]  
**Cc:** Traylor, Patrick[traylor.patrick@epa.gov]; Schwab, Justin[schwab.justin@epa.gov]  
**From:** Gunasekara, Mandy  
**Sent:** Thur 12/7/2017 3:19:30 PM  
**Subject:** RE: OECA comments  
[NSR policy memo draft 2017 12 2 edits \(OECA Edits December 6 2017\)\) oar response.docx](#)  
[NSR policy memo FINAL for Admin Signature 2017 12 07.docx](#)

Susan/Patrick/Justin - Attached are OAR responses to the OECA comments. I've also attached the final version that incorporates additional OAR comments and OGC's. I'm happy to discuss when I get back.

Per the conversation with the Administrator yesterday with Justin and I, we are going to send it out today. Exact timing is somewhat TBD as I'm working through some logistics.

Best,  
Mandy

**From:** Bodine, Susan  
**Sent:** Wednesday, December 6, 2017 5:56 PM  
**To:** Gunasekara, Mandy <Gunasekara.Mandy@epa.gov>  
**Cc:** Traylor, Patrick <traylor.patrick@epa.gov>; Schwab, Justin <Schwab.Justin@epa.gov>  
**Subject:** OECA comments  
**Importance:** High

Mandy,

Attached are comments from Patrick and myself. They track our discussion yesterday. In

## Ex. 5 - Deliberative Process

Susan



**To:** Koerber, Mike[Koerber.Mike@epa.gov]  
**Cc:** Lewis, Josh[Lewis.Josh@epa.gov]; Page, Steve[Page.Steve@epa.gov]; Wood, Anna[Wood.Anna@epa.gov]; Dominguez, Alexander[dominguez.alexander@epa.gov]  
**From:** Gunasekara, Mandy  
**Sent:** Thur 12/7/2017 3:08:30 PM  
**Subject:** RE: Edits  
[NSR policy memo\\_final\\_2017\\_12\\_07\\_redline.docx](#)  
[NSR policy memo\\_FINAL for Admin Signature 2017\\_12\\_07.docx](#)

Thank you. I've incorporated your edits, some of OECA's and OGC's. Attached is the final version (and redline) I'll soon send down for the Administrator's signature as he wants to get this out today.

**From:** Koerber, Mike  
**Sent:** Wednesday, December 6, 2017 2:40 PM  
**To:** Gunasekara, Mandy <Gunasekara.Mandy@epa.gov>  
**Cc:** Lewis, Josh <Lewis.Josh@epa.gov>; Page, Steve <Page.Steve@epa.gov>; Wood, Anna <Wood.Anna@epa.gov>; Dominguez, Alexander <dominguez.alexander@epa.gov>  
**Subject:** Edits

Mandy – In response to your request yesterday, here are a few suggested edits to the draft memo. Please let me know if you have any questions.

Mike

**To:** Wehrum, Bill[Wehrum.Bill@epa.gov]; Harlow, David[harlow.david@epa.gov]  
**Cc:** Dominguez, Alexander[dominguez.alexander@epa.gov]  
**From:** Gunasekara, Mandy  
**Sent:** Thur 12/7/2017 6:40:48 AM  
**Subject:** Memo

NSR policy memo draft 2017 12 2 edits (OECA Edits December 6 2017) redact.pdf  
NSR Memo TPs for press.docx

Attached are OECA's suggested edits. I redacted offending portions. There is really only one edit regarding a typo in footnote 11 I think is a keeper. Give me a call when you are up and ready to chat.

Ex. 6 - Personal Privacy

I've also attached some general background and draft TPs I'd like to give to OPA to help draft a press release. I told comms I'd like to get this out by noonish/1 tomorrow. I also have not looped in Millet yet, but will as soon as we touch base in the morning.

**Mandy M. Gunasekara**

Principal Deputy Assistant Administrator

Office of Air and Radiation

US Environmental Protection Agency

**To:** Wood, Jeffrey (ENRD)[Jeffrey.Wood@usdoj.gov]  
**Cc:** Schwab, Justin[schwab.justin@epa.gov]  
**From:** Gunasekara, Mandy  
**Sent:** Wed 12/6/2017 10:31:29 PM  
**Subject:** NSR Memo #1  
[NSR policy memo draft final 2017 12 05.docx](#)

Hey Jeff,

Attached is the latest iteration of the NSR memo. It will likely have a few tweaks between now and tomorrow when it goes out. I'll send you the final at some point tomorrow. I'm about to spend some time on a plane to Houston going through OGCs suggested edits (which I just received).

Best,  
Mandy

(202)306-8538

**Mandy M. Gunasekara**

Principal Deputy Assistant Administrator

Office of Air and Radiation

US Environmental Protection Agency

**To:** Wehrum, Bill[Wehrum.Bill@epa.gov]  
**Cc:** Gunasekara, Mandy[Gunasekara.Mandy@epa.gov]  
**From:** Palmieri, Rosario A. EOP/OMB  
**Sent:** Thur 3/8/2018 9:18:44 PM  
**Subject:** RE: NSR Memo

## Ex. 5 - Deliberative Process

**From:** Palmieri, Rosario A. EOP/OMB  
**Sent:** Thursday, March 8, 2018 1:18 PM  
**To:** 'Wehrum, Bill' <Wehrum.Bill@epa.gov>  
**Cc:** 'Gunasekara, Mandy' <Gunasekara.Mandy@epa.gov>  
**Subject:** RE: NSR Memo

## Ex. 5 - Deliberative Process

**From:** Wehrum, Bill [mailto:Wehrum.Bill@epa.gov]  
**Sent:** Thursday, March 8, 2018 1:04 PM  
**To:** Palmieri, Rosario A. EOP/OMB <Ex. 6 - Personal Privacy>  
**Cc:** Gunasekara, Mandy <Gunasekara.Mandy@epa.gov>  
**Subject:** NSR Memo

## Ex. 5 - Deliberative Process

---

Bill Wehrum

Assistant Administrator

Office of Air and Radiation

U.S. Environmental Protection Agency

(202) 564-7404

**To:** Gunasekara, Mandy[Gunasekara.Mandy@epa.gov]  
**From:** Maddox, Mark  
**Sent:** Mon 11/6/2017 8:15:39 PM  
**Subject:** RegulatoryIssues.docx  
[RegulatoryIssues.docx](#)

Mandy,

What more item on FE's regulatory agenda.

Thank you,

Mark

**To:** Wehrum, Bill[Wehrum.Bill@epa.gov]  
**Cc:** Dravis, Samantha[dravis.samantha@epa.gov]; Schwab, Justin[Schwab.Justin@epa.gov]; Gunasekara, Mandy[Gunasekara.Mandy@epa.gov]  
**From:** Bolen, Brittany  
**Sent:** Thur 3/8/2018 3:22:40 AM  
**Subject:** Re: OIRA Pass Back on NSR Memo

I wasn't able to join call today, but the document Justin sent is the last version I received as well.

Sent from my iPhone

On Mar 7, 2018, at 9:18 PM, Wehrum, Bill <Wehrum.Bill@epa.gov> wrote:

I'm not sure this includes DOJ's comments. Is there more?

---

Bill Wehrum  
Assistant Administrator  
Office of Air and Radiation  
U.S. Environmental Protection Agency  
(202) 564-7404

On Mar 7, 2018, at 8:25 PM, Dravis, Samantha <dravis.samantha@epa.gov> wrote:

Sorry for the delay, Bill. Thanks for sending it Justin.

Sent from my iPhone

On Mar 7, 2018, at 6:58 PM, Wehrum, Bill <Wehrum.Bill@epa.gov> wrote:

Thanks Justin.

---

Bill Wehrum  
Assistant Administrator  
Office of Air and Radiation

U.S. Environmental Protection Agency

(202) 564-7404

**From:** Schwab, Justin  
**Sent:** Wednesday, March 7, 2018 6:58 PM  
**To:** Wehrum, Bill <[Wehrum.Bill@epa.gov](mailto:Wehrum.Bill@epa.gov)>; Dravis, Samantha <[dravis.samantha@epa.gov](mailto:dravis.samantha@epa.gov)>; Bolen, Brittany <[bolen.brittany@epa.gov](mailto:bolen.brittany@epa.gov)>  
**Cc:** Gunasekara, Mandy <[Gunasekara.Mandy@epa.gov](mailto:Gunasekara.Mandy@epa.gov)>  
**Subject:** RE: OIRA Pass Back on NSR Memo

I believe that the attached was send from OMB at 11 this morning.

**From:** Wehrum, Bill  
**Sent:** Wednesday, March 7, 2018 6:56 PM  
**To:** Dravis, Samantha <[dravis.samantha@epa.gov](mailto:dravis.samantha@epa.gov)>; Schwab, Justin <[Schwab.Justin@epa.gov](mailto:Schwab.Justin@epa.gov)>; Bolen, Brittany <[bolen.brittany@epa.gov](mailto:bolen.brittany@epa.gov)>  
**Cc:** Gunasekara, Mandy <[Gunasekara.Mandy@epa.gov](mailto:Gunasekara.Mandy@epa.gov)>  
**Subject:** OIRA Pass Back on NSR Memo

I'd like to see the latest interagency comments on the NSR memo on project emissions accounting. I understand the last set of comments was sent over today. Do you have a copy that you can share?

---

Bill Wehrum

Assistant Administrator

Office of Air and Radiation

U.S. Environmental Protection Agency

(202) 564-7404



**To:** Gunasekara, Mandy[Gunasekara.Mandy@epa.gov]; Harlow, David[harlow.david@epa.gov]; Woods, Clint[woods.clint@epa.gov]  
**Cc:** Dominguez, Alexander[dominguez.alexander@epa.gov]; Millett, John[Millett.John@epa.gov]  
**From:** DeLuca, Isabel  
**Sent:** Tue 3/6/2018 6:47:48 PM  
**Subject:** NSR Project emissions accounting memo  
DRAFT PR NSR project netting OGC comments.docx

Hi Mandy,

OGC sent me some late edits to the draft press release for the NSR memo—see redline edits attached. (This version also contains the url where we will post the memo.) I think you and David have the pen on the PR now, so I wanted to forward these to you for awareness.

Thanks,  
Isabel

**Isabel DeLuca**

Office of Air and Radiation, US EPA

(202) 343-9247

**To:** Wehrum, Bill[Wehrum.Bill@epa.gov]; Gunasekara, Mandy[Gunasekara.Mandy@epa.gov]  
**From:** Harlow, David  
**Sent:** Tue 3/6/2018 5:02:50 PM  
**Subject:** FW: Discuss Project Emissions Accounting Memo  
Project Emissions Accounting Guidance Memorandum\_draft\_3-2-18-TED.docx  
ATT00001.htm

Fourth of five. This is OECA.

**David S. Harlow**  
**Senior Counsel**

**Immediate Office of the Assistant Administrator**  
**Office of Air and Radiation, USEPA**  
**WJC-N Room 5409K**

**1200 Pennsylvania Avenue NW**  
**Washington, DC 20460**  
**202-564-1233**

[Harlow.David@epa.gov](mailto:Harlow.David@epa.gov)

**From:** Santiago, Juan  
**Sent:** Monday, March 5, 2018 8:22 PM  
**To:** Harlow, David <harlow.david@epa.gov>  
**Cc:** Wood, Anna <Wood.Anna@epa.gov>; Harnett, Bill <Harnett.Bill@epa.gov>  
**Subject:** Fwd: Discuss Project Emissions Accounting Memo

Comments from OECA.

Sent from my iPhone

Begin forwarded message:

**From:** "Dykes, Teresa" <[Dykes.Teresa@epa.gov](mailto:Dykes.Teresa@epa.gov)>  
**Date:** March 5, 2018 at 6:01:03 PM EST  
**To:** "Rios, Gerardo" <[Rios.Gerardo@epa.gov](mailto:Rios.Gerardo@epa.gov)>, "Chan, Suilin" <[Chan.Suilin@epa.gov](mailto:Chan.Suilin@epa.gov)>, "Santiago, Juan" <[Santiago.Juan@epa.gov](mailto:Santiago.Juan@epa.gov)>, "Rao, Raj" <[Rao.Raj@epa.gov](mailto:Rao.Raj@epa.gov)>, "Montanez, Jessica" <[Montanez.Jessica@epa.gov](mailto:Montanez.Jessica@epa.gov)>, "Keller, Peter" <[keller.peter@epa.gov](mailto:keller.peter@epa.gov)>, "Svendsgaard, Dave" <[Svendsgaard.Dave@epa.gov](mailto:Svendsgaard.Dave@epa.gov)>, "Doster, Brian"

<Doster.Brian@epa.gov>, "Krallman, John" <krallman.john@epa.gov>, "Chapman, Apple" <Chapman.Apple@epa.gov>, "Bird, Patrick" <Bird.Patrick@epa.gov>, "Bray, Dave" <Bray.Dave@epa.gov>, "Campbell, Dave" <campbell.dave@epa.gov>, "Ceron, Heather" <Ceron.Heather@epa.gov>, "Dahl, Donald" <dahl.donald@epa.gov>, "Damico, Genevieve" <damico.genevieve@epa.gov>, "Davis, Scott" <Davis.ScottR@epa.gov>, "Fallon, Gail" <fallon.gail@epa.gov>, "Hardesty, Doug" <Hardesty.Doug@epa.gov>, "Knodel, Jon" <Knodel.Jon@epa.gov>, "McFadden, Kelly" <McFadden.Kelly@epa.gov>, "Mooney, John" <Mooney.John@epa.gov>, "Robinson, Jeffrey" <Robinson.Jeffrey@epa.gov>, "Smith, Mark A." <Smith.MarkA@epa.gov>, "Werner, Leslye" <Werner.Leslye@epa.gov>, "duke, gerallyn" <duke.gerallyn@epa.gov>  
**Cc:** "Fortin, Kelly" <Fortin.Kelly@epa.gov>, "Adams, Yolanda" <Adams.Yolanda@epa.gov>, "Shepherd, Lorinda" <Shepherd.Lorinda@epa.gov>, "Siegel, Joseph" <Siegel.Joseph@epa.gov>, "Ruvo, Richard" <Ruvo.Richard@epa.gov>, "Villatora, Liliana" <Villatora.Liliana@epa.gov>, "Morales, Monica" <Morales.Monica@epa.gov>, "Logan, Paul" <Logan.Paul@epa.gov>, "Dholakia, Umesh" <Dholakia.Umesh@epa.gov>, "Jon, Frank" <Jon.Frank@epa.gov>, "Joffe, Brian" <Joffe.Brian@epa.gov>, "Brooks, Phillip" <Brooks.Phillip@epa.gov>, "Fried, Gregory" <Fried.Gregory@epa.gov>, "Wood, Anna" <Wood.Anna@epa.gov>, "Harnett, Bill" <Harnett.Bill@epa.gov>  
**Subject: RE: Discuss Project Emissions Accounting Memo**

AED has the following concerns with the revised memo- and made suggested edits in the attached to address these concerns.

## Ex. 5 - Deliberative Process

Terri Dykes

Senior Attorney

Office of Enforcement and Compliance Assurance

1200 Pennsylvania Ave. NW

Washington, DC 20460

202.564.9883

**CONFIDENTIAL:** This transmission may contain deliberative and/or enforcement confidential, attorney-client, or otherwise privileged material. Do not release under FOIA without appropriate review. If you have received this message in error, you are asked to notify the sender and to delete this message.

---

**From:** Rios, Gerardo

**Sent:** Monday, March 05, 2018 5:23 PM

**To:** Chan, Suilin <[Chan.Suilin@epa.gov](mailto:Chan.Suilin@epa.gov)>; Santiago, Juan <[Santiago.Juan@epa.gov](mailto:Santiago.Juan@epa.gov)>; Rao, Raj <[Rao.Raj@epa.gov](mailto:Rao.Raj@epa.gov)>; Montanez, Jessica <[Montanez.Jessica@epa.gov](mailto:Montanez.Jessica@epa.gov)>; Keller, Peter <[keller.peter@epa.gov](mailto:keller.peter@epa.gov)>; Svendsgaard, Dave <[Svendsgaard.Dave@epa.gov](mailto:Svendsgaard.Dave@epa.gov)>; Doster, Brian <[Doster.Brian@epa.gov](mailto:Doster.Brian@epa.gov)>; Krallman, John <[krallman.john@epa.gov](mailto:krallman.john@epa.gov)>; Chapman, Apple <[Chapman.Apple@epa.gov](mailto:Chapman.Apple@epa.gov)>; Bird, Patrick <[Bird.Patrick@epa.gov](mailto:Bird.Patrick@epa.gov)>; Bray, Dave <[Bray.Dave@epa.gov](mailto:Bray.Dave@epa.gov)>; Campbell, Dave <[campbell.dave@epa.gov](mailto:campbell.dave@epa.gov)>; Ceron, Heather <[Ceron.Heather@epa.gov](mailto:Ceron.Heather@epa.gov)>; Dahl, Donald <[dahl.donald@epa.gov](mailto:dahl.donald@epa.gov)>; Damico, Genevieve <[damico.genevieve@epa.gov](mailto:damico.genevieve@epa.gov)>; Davis, Scott <[Davis.ScottR@epa.gov](mailto:Davis.ScottR@epa.gov)>; Fallon, Gail <[fallon.gail@epa.gov](mailto:fallon.gail@epa.gov)>; Hardesty, Doug <[Hardesty.Doug@epa.gov](mailto:Hardesty.Doug@epa.gov)>; Knodel, Jon <[Knodel.Jon@epa.gov](mailto:Knodel.Jon@epa.gov)>; McFadden, Kelly <[McFadden.Kelly@epa.gov](mailto:McFadden.Kelly@epa.gov)>; Mooney, John <[Mooney.John@epa.gov](mailto:Mooney.John@epa.gov)>; Robinson, Jeffrey <[Robinson.Jeffrey@epa.gov](mailto:Robinson.Jeffrey@epa.gov)>; Smith, Mark A. <[Smith.Marka@epa.gov](mailto:Smith.Marka@epa.gov)>; Werner, Leslye <[Werner.Leslye@epa.gov](mailto:Werner.Leslye@epa.gov)>; duke, gerallyn <[duke.gerallyn@epa.gov](mailto:duke.gerallyn@epa.gov)>; Dykes, Teresa <[Dykes.Teresa@epa.gov](mailto:Dykes.Teresa@epa.gov)>

**Cc:** Fortin, Kelly <[Fortin.Kelly@epa.gov](mailto:Fortin.Kelly@epa.gov)>; Adams, Yolanda <[Adams.Yolanda@epa.gov](mailto:Adams.Yolanda@epa.gov)>; Shepherd, Lorinda <[Shepherd.Lorinda@epa.gov](mailto:Shepherd.Lorinda@epa.gov)>; Siegel, Joseph <[Siegel.Joseph@epa.gov](mailto:Siegel.Joseph@epa.gov)>; Ruvo, Richard <[Ruvo.Richard@epa.gov](mailto:Ruvo.Richard@epa.gov)>; Villatora, Liliana <[Villatora.Liliana@epa.gov](mailto:Villatora.Liliana@epa.gov)>; Morales, Monica <[Morales.Monica@epa.gov](mailto:Morales.Monica@epa.gov)>; Logan, Paul <[Logan.Paul@epa.gov](mailto:Logan.Paul@epa.gov)>; Dholakia, Umesh <[Dholakia.Umesh@epa.gov](mailto:Dholakia.Umesh@epa.gov)>; Jon, Frank <[Jon.Frank@epa.gov](mailto:Jon.Frank@epa.gov)>; Joffe, Brian <[Joffe.Brian@epa.gov](mailto:Joffe.Brian@epa.gov)>; Brooks, Phillip <[Brooks.Phillip@epa.gov](mailto:Brooks.Phillip@epa.gov)>; Fried, Gregory <[Fried.Gregory@epa.gov](mailto:Fried.Gregory@epa.gov)>; Wood, Anna <[Wood.Anna@epa.gov](mailto:Wood.Anna@epa.gov)>; Harnett, Bill <[Harnett.Bill@epa.gov](mailto:Harnett.Bill@epa.gov)>

**Subject:** RE: Discuss Project Emissions Accounting Memo

Thank you for making the changes so far and for including footnote 10 which state:

## Ex. 5 - Deliberative Process

I agree with R2 and R7's comments.

Thanks.

Gerardo

---

**From:** Chan, Suilin

**Sent:** Monday, March 5, 2018 1:07 PM

**To:** Santiago, Juan <[Santiago.Juan@epa.gov](mailto:Santiago.Juan@epa.gov)>; Rao, Raj <[Rao.Raj@epa.gov](mailto:Rao.Raj@epa.gov)>; Montanez, Jessica <[Montanez.Jessica@epa.gov](mailto:Montanez.Jessica@epa.gov)>; Keller, Peter <[keller.peter@epa.gov](mailto:keller.peter@epa.gov)>; Svendsgaard, Dave <[Svendsgaard.Dave@epa.gov](mailto:Svendsgaard.Dave@epa.gov)>; Doster, Brian <[Doster.Brian@epa.gov](mailto:Doster.Brian@epa.gov)>; Krallman, John <[krallman.john@epa.gov](mailto:krallman.john@epa.gov)>; Chapman, Apple <[Chapman.Apple@epa.gov](mailto:Chapman.Apple@epa.gov)>; Bird, Patrick <[Bird.Patrick@epa.gov](mailto:Bird.Patrick@epa.gov)>; Bray, Dave <[Bray.Dave@epa.gov](mailto:Bray.Dave@epa.gov)>; Campbell, Dave <[campbell.dave@epa.gov](mailto:campbell.dave@epa.gov)>; Ceron, Heather <[Ceron.Heather@epa.gov](mailto:Ceron.Heather@epa.gov)>; Dahl, Donald <[dahl.donald@epa.gov](mailto:dahl.donald@epa.gov)>; Damico, Genevieve <[damico.genevieve@epa.gov](mailto:damico.genevieve@epa.gov)>; Davis, Scott <[Davis.ScottR@epa.gov](mailto:Davis.ScottR@epa.gov)>; Fallon, Gail <[fallon.gail@epa.gov](mailto:fallon.gail@epa.gov)>; Hardesty, Doug <[Hardesty.Doug@epa.gov](mailto:Hardesty.Doug@epa.gov)>; Knodel, Jon <[Knodel.Jon@epa.gov](mailto:Knodel.Jon@epa.gov)>; McFadden, Kelly <[McFadden.Kelly@epa.gov](mailto:McFadden.Kelly@epa.gov)>; Mooney, John <[Mooney.John@epa.gov](mailto:Mooney.John@epa.gov)>; Rios, Gerardo <[Rios.Gerardo@epa.gov](mailto:Rios.Gerardo@epa.gov)>; Robinson, Jeffrey <[Robinson.Jeffrey@epa.gov](mailto:Robinson.Jeffrey@epa.gov)>; Smith, Mark A. <[Smith.Marka@epa.gov](mailto:Smith.Marka@epa.gov)>; Werner, Leslye <[Werner.Leslye@epa.gov](mailto:Werner.Leslye@epa.gov)>; duke, gerallyn <[duke.gerallyn@epa.gov](mailto:duke.gerallyn@epa.gov)>; Dykes, Teresa

<Dykes.Teresa@epa.gov>

**Cc:** Fortin, Kelly <Fortin.Kelly@epa.gov>; Adams, Yolanda <Adams.Yolanda@epa.gov>;  
Shepherd, Lorinda <Shepherd.Lorinda@epa.gov>; Siegel, Joseph  
<Siegel.Joseph@epa.gov>; Ruvo, Richard <Ruvo.Richard@epa.gov>; Villatora, Liliana  
<Villatora.Liliana@epa.gov>; Morales, Monica <Morales.Monica@epa.gov>; Logan, Paul  
<Logan.Paul@epa.gov>; Dholakia, Umesh <Dholakia.Umesh@epa.gov>; Jon, Frank  
<Jon.Frank@epa.gov>; Joffe, Brian <Joffe.Brian@epa.gov>; Brooks, Phillip  
<Brooks.Phillip@epa.gov>; Fried, Gregory <Fried.Gregory@epa.gov>; Wood, Anna  
<Wood.Anna@epa.gov>; Harnett, Bill <Harnett.Bill@epa.gov>

**Subject:** RE: Discuss Project Emissions Accounting Memo

Below are Region 2's comments on the latest draft of the PEA Memo:

## Ex. 5 - Deliberative Process

# Ex. 5 - Deliberative Process

Thanks,

Suilin

---

**From:** Santiago, Juan

**Sent:** Friday, March 02, 2018 4:50 PM

**To:** Rao, Raj <[Rao.Raj@epa.gov](mailto:Rao.Raj@epa.gov)>; Montanez, Jessica <[Montanez.Jessica@epa.gov](mailto:Montanez.Jessica@epa.gov)>; Keller, Peter <[keller.peter@epa.gov](mailto:keller.peter@epa.gov)>; Svendsgaard, Dave <[Svendsgaard.Dave@epa.gov](mailto:Svendsgaard.Dave@epa.gov)>; Doster, Brian <[Doster.Brian@epa.gov](mailto:Doster.Brian@epa.gov)>; Krallman, John <[krallman.john@epa.gov](mailto:krallman.john@epa.gov)>; Chapman, Apple <[Chapman.Apple@epa.gov](mailto:Chapman.Apple@epa.gov)>; Bird, Patrick <[Bird.Patrick@epa.gov](mailto:Bird.Patrick@epa.gov)>; Bray, Dave <[Bray.Dave@epa.gov](mailto:Bray.Dave@epa.gov)>; Campbell, Dave <[campbell.dave@epa.gov](mailto:campbell.dave@epa.gov)>; Ceron, Heather <[Ceron.Heather@epa.gov](mailto:Ceron.Heather@epa.gov)>; Chan, Suilin <[Chan.Suilin@epa.gov](mailto:Chan.Suilin@epa.gov)>; Dahl, Donald <[dahl.donald@epa.gov](mailto:dahl.donald@epa.gov)>; Damico, Genevieve <[damico.genevieve@epa.gov](mailto:damico.genevieve@epa.gov)>; Davis, Scott <[Davis.ScottR@epa.gov](mailto:Davis.ScottR@epa.gov)>; Fallon, Gail <[fallon.gail@epa.gov](mailto:fallon.gail@epa.gov)>; Hardesty, Doug <[Hardesty.Doug@epa.gov](mailto:Hardesty.Doug@epa.gov)>; Knodel, Jon <[Knodel.Jon@epa.gov](mailto:Knodel.Jon@epa.gov)>; McFadden, Kelly <[McFadden.Kelly@epa.gov](mailto:McFadden.Kelly@epa.gov)>; Mooney, John <[Mooney.John@epa.gov](mailto:Mooney.John@epa.gov)>; Rios, Gerardo <[Rios.Gerardo@epa.gov](mailto:Rios.Gerardo@epa.gov)>; Robinson, Jeffrey <[Robinson.Jeffrey@epa.gov](mailto:Robinson.Jeffrey@epa.gov)>; Smith, Mark A. <[Smith.Marka@epa.gov](mailto:Smith.Marka@epa.gov)>; Werner, Leslye <[Werner.Leslye@epa.gov](mailto:Werner.Leslye@epa.gov)>; duke, gerallyn <[duke.gerallyn@epa.gov](mailto:duke.gerallyn@epa.gov)>; Dykes, Teresa <[Dykes.Teresa@epa.gov](mailto:Dykes.Teresa@epa.gov)>

**Cc:** Fortin, Kelly <[Fortin.Kelly@epa.gov](mailto:Fortin.Kelly@epa.gov)>; Adams, Yolanda <[Adams.Yolanda@epa.gov](mailto:Adams.Yolanda@epa.gov)>; Shepherd, Lorinda <[Shepherd.Lorinda@epa.gov](mailto:Shepherd.Lorinda@epa.gov)>; Siegel, Joseph <[Siegel.Joseph@epa.gov](mailto:Siegel.Joseph@epa.gov)>; Ruvo, Richard <[Ruvo.Richard@epa.gov](mailto:Ruvo.Richard@epa.gov)>; Villatora, Liliana <[Villatora.Liliana@epa.gov](mailto:Villatora.Liliana@epa.gov)>; Morales, Monica <[Morales.Monica@epa.gov](mailto:Morales.Monica@epa.gov)>; Logan, Paul <[Logan.Paul@epa.gov](mailto:Logan.Paul@epa.gov)>; Dholakia, Umesh <[Dholakia.Umesh@epa.gov](mailto:Dholakia.Umesh@epa.gov)>; Jon, Frank <[Jon.Frank@epa.gov](mailto:Jon.Frank@epa.gov)>; Joffe, Brian <[Joffe.Brian@epa.gov](mailto:Joffe.Brian@epa.gov)>; Brooks, Phillip <[Brooks.Phillip@epa.gov](mailto:Brooks.Phillip@epa.gov)>; Fried, Gregory <[Fried.Gregory@epa.gov](mailto:Fried.Gregory@epa.gov)>; Wood, Anna <[Wood.Anna@epa.gov](mailto:Wood.Anna@epa.gov)>; Harnett, Bill <[Harnett.Bill@epa.gov](mailto:Harnett.Bill@epa.gov)>

**Subject:** RE: Discuss Project Emissions Accounting Memo

Hello everyone. As discussed during our meeting earlier today, attached is the most recent version of the memo that reflects edits made in response to your earlier feedback as well as some other refinements. We ask that you provide comments by COB EST on Monday,

March 5. We are looking to finalize and issue on Tuesday, the 6th.

Thanks!

Juan

<< File: Project Emissions Accounting Guidance Memorandum\_draft\_3-2-18.docx >>

-----Original Appointment-----

**From:** Wehrum, Bill

**Sent:** Thursday, March 01, 2018 4:22 PM

**To:** Wehrum, Bill; Gunasekara, Mandy; Harlow, David; Lewis, Josh; Tsirigotis, Peter; Koerber, Mike; Woods, Clint; Harnett, Bill; Santiago, Juan; Rao, Raj; Montanez, Jessica; Keller, Peter; Svendsgaard, Dave; Doster, Brian; Krallman, John; Chapman, Apple; Bird, Patrick; Bray, Dave; Campbell, Dave; Ceron, Heather; Chan, Suilin; Dahl, Donald; Damico, Genevieve; Davis, Scott; Fallon, Gail; Hardesty, Doug; Knodel, Jon; McFadden, Kelly; Mooney, John; Rios, Gerardo; Robinson, Jeffrey; Smith, Mark A.; Werner, Leslye; duke, gerallyn

**Cc:** Massey, Lana; Johnson, Yvonne W; Long, Pam; Fortin, Kelly; Adams, Yolanda; Shepherd, Lorinda; Siegel, Joseph; Ruvo, Richard; Villatora, Liliana; Morales, Monica; Logan, Paul; Dholakia, Umesh; Jon, Frank; Joffe, Brian; Dykes, Teresa; Brooks, Phillip; Fried, Gregory

**Subject:** Discuss Project Emissions Accounting Memo

**When:** Friday, March 02, 2018 2:00 PM-2:30 PM (UTC-05:00) Eastern Time (US & Canada).

**Where:** WJC-N 5400 + Video with RTP + Dial: Ex. 6 - Personal Privacy Participant Code Ex. 6 - Personal Privacy

**This meeting is still scheduled and HQ will open the video and audio lines**

**To:** Wehrum, Bill; Gunasekara, Mandy; Harlow, David; Lewis, Josh; Tsirigotis, Peter; Koerber, Mike; Wood, Anna; Harnett, Bill; Santiago, Juan; Rao, Raj; Montanez, Jessica; Keller, Peter; Svendsgaard, Dave

Doster, Brian; Krallman, John; Chapman, Apple; Bird, Patrick; Bray, Dave; Campbell, Dave; Ceron, Heather; Chan, Suilin; Dahl, Donald; Damico, Genevieve; Davis, Scott; Duke, Gerallyn; Fallon, Gail; Hardesty, Doug; Knodel, Jon; McFadden, Kelly; Mooney, John; Rios, Gerardo; Robinson,

Jeffrey; Smith, Mark A.; Werner, Leslye; Bray, Dave

**Cc:** Massey, Lana; Johnson, Yvonne; Long, Pam

<< File: OAR AA Wehrum Meeting Request Project Emission Memo 03\_01\_18.docx >>

**To:** Wilcox, Jahan[wilcox.jahan@epa.gov]  
**Cc:** Gunasekara, Mandy[Gunasekara.Mandy@epa.gov]; Jackson, Ryan[jackson.ryan@epa.gov]  
**From:** Bowman, Liz  
**Sent:** Thur 12/7/2017 5:43:38 PM  
**Subject:** FW: Signed NSR Memo  
[NSR Policy Memo.12.7.17.pdf](#)  
[ATT00001.htm](#)

Can you please help us get this to a few people who might be interested, after the Hearing concludes? I plan to send it to Mary Kissel on the WSJ editorial page, please send it to the reporters you suggest. The program has indicated they are going to give it to Politico, E&E, etc. as soon as they get a copy, so if you want to provide it some folks after the hearing, that would be appreciated. Background on the issue is below:

### **Draft Desk Statement**

### **Dec. 7 DTE/NSR Memo**

# **Ex. 5 - Deliberative Process**

# **Ex. 5 - Deliberative Process**

Depending upon individual facts and circumstances, it may not apply to a particular situation. More information: <https://www.epa.gov/nsr>

**To:** White, Elizabeth[white.elizabeth@epa.gov]; Gunasekara, Mandy[Gunasekara.Mandy@epa.gov]  
**From:** Hope, Brian  
**Sent:** Thur 12/7/2017 4:49:31 PM  
**Subject:** RE: Memo  
[NSR policy memo\\_FINAL for Admin Signature 2017 12 07.OEX REV.docx](#)

Attached. Thanks!  
- Brian

Brian T. Hope  
Deputy Director  
Office of the Executive Secretariat  
Office of the Administrator  
(202) 564-8212

-----Original Message-----

From: White, Elizabeth  
Sent: Thursday, December 07, 2017 11:48 AM  
To: Gunasekara, Mandy <Gunasekara.Mandy@epa.gov>  
Cc: Hope, Brian <Hope.Brian@epa.gov>  
Subject: RE: Memo

Mandy - Brian can send you the document we are working off of and you can make your edits there.

Beth

Beth White  
Director, Office of the Executive Secretariat U.S. Environmental Protection Agency  
(202) 564-1781 direct  
(202) 816-1701 cell

-----Original Message-----

From: Gunasekara, Mandy  
Sent: Thursday, December 7, 2017 11:32 AM  
To: White, Elizabeth <white.elizabeth@epa.gov>  
Subject: Memo

I have two minor edits! Can you wait for me to send the updated memo?

Sent from my iPhone

**To:** Gunasekara, Mandy[Gunasekara.Mandy@epa.gov]  
**Cc:** Traylor, Patrick[traylor.patrick@epa.gov]; Schwab, Justin[Schwab.Justin@epa.gov]  
**From:** Bodine, Susan  
**Sent:** Wed 12/6/2017 10:56:29 PM  
**Subject:** OECA comments  
NSR policy memo\_draft\_2017\_12\_2 edits (OECA Edits December 6 2017).docx

Mandy,

Attached are comments from Patrick and myself. They track our discussion yesterday. In

## **Ex. 5 - Deliberative Process**

Susan

**To:** Gunasekara, Mandy[Gunasekara.Mandy@epa.gov]  
**Cc:** Lewis, Josh[Lewis.Josh@epa.gov]; Page, Steve[Page.Steve@epa.gov]; Wood, Anna[Wood.Anna@epa.gov]; Dominguez, Alexander[dominguez.alexander@epa.gov]  
**From:** Koerber, Mike  
**Sent:** Wed 12/6/2017 7:40:07 PM  
**Subject:** Edits  
[NSR policy memo\\_OAQPS edits\\_12-6-17.docx](#)

Mandy – In response to your request yesterday, here are a few suggested edits to the draft memo. Please let me know if you have any questions.

Mike

**To:** Ford, Hayley[ford.hayley@epa.gov]  
**Cc:** Gunasekara, Mandy[Gunasekara.Mandy@epa.gov]  
**From:** Wehrum, Bill  
**Sent:** Tue 3/6/2018 1:24:56 AM  
**Subject:** Re: NSR

Hayley - We did not discuss this with the Administrator today. Can we squeeze this in tomorrow? Mandy suggested maybe first thing - as part of the 8:30 or coming/going from the 8:30?

---

Bill Wehrum  
Assistant Administrator  
Office of Air and Radiation  
U.S. Environmental Protection Agency  
(202) 564-7404

On Mar 5, 2018, at 10:49 AM, Ford, Hayley <[ford.hayley@epa.gov](mailto:ford.hayley@epa.gov)> wrote:

This morning Sam mentioned that he may need to be briefed on the "Project Netting" memo. Thoughts?

## **Hayley Ford**

Deputy White House Liaison and Personal Aide to the Administrator

Environmental Protection Agency

[ford.hayley@epa.gov](mailto:ford.hayley@epa.gov)

Phone: 202-564-2022

Cell: 202-306-1296

**From:** Dravis, Samantha  
**Sent:** Monday, March 5, 2018 10:48 AM  
**To:** Ford, Hayley <[ford.hayley@epa.gov](mailto:ford.hayley@epa.gov)>  
**Subject:** Re: NSR

"Project Netting" Memo

Sent from my iPad

On Mar 5, 2018, at 10:40 AM, Ford, Hayley <[ford.hayley@epa.gov](mailto:ford.hayley@epa.gov)> wrote:

Sam – What is the NSR item that you mentioned Bill should brief him on this week?

Thanks!

**Hayley Ford**

Deputy White House Liaison and Personal Aide to the Administrator

Environmental Protection Agency

[ford.hayley@epa.gov](mailto:ford.hayley@epa.gov)

Phone: 202-564-2022

Cell: 202-306-1296

**To:** Harlow, David[harlow.david@epa.gov]  
**Cc:** Gunasekara, Mandy[Gunasekara.Mandy@epa.gov]  
**From:** Wehrum, Bill  
**Sent:** Sun 2/25/2018 12:42:14 AM  
**Subject:** Re: NSR Memo

I think they do not realize that this is a narrow issue that is not really worth their time. Mandy, let's discuss with them on Monday after our MTE meeting.

---

Bill Wehrum  
Assistant Administrator  
Office of Air and Radiation  
U.S. Environmental Protection Agency  
(202) 564-7404

On Feb 24, 2018, at 6:51 PM, Harlow, David <[harlow.david@epa.gov](mailto:harlow.david@epa.gov)> wrote:

## Ex. 5 - Deliberative Process

**Ex. 5 - Deliberative Process**

My two cents, anyhow.

Sent from my iPhone

On Feb 24, 2018, at 5:40 PM, Gunasekara, Mandy <[Gunasekara.Mandy@epa.gov](mailto:Gunasekara.Mandy@epa.gov)> wrote:

**Ex. 5 - Deliberative Process**

Sent from my iPhone

Begin forwarded message:

**From:** "Palmieri, Rosario A. EOP/OMB"

**Ex. 6 - Personal Privacy**

**Date:** February 23, 2018 at 7:54:30 PM EST

**To:** "Gunasekara, Mandy" <[Gunasekara.Mandy@epa.gov](mailto:Gunasekara.Mandy@epa.gov)>, "Catanzaro, Michael J. EOP/WHO"

EOP/WHO" <

**Ex. 6 - Personal Privacy**

"Moran, John S.

EOP/WHO" <

Szabo, Aaron L. EOP/CEQ"

**Ex. 6 - Personal Privacy**

**Cc:** "Wehrum, Bill" <[Wehrum.Bill@epa.gov](mailto:Wehrum.Bill@epa.gov)>, "Harlow, David" <[harlow.david@epa.gov](mailto:harlow.david@epa.gov)>

**Subject: RE: NSR Memo**

Mandy,

Thank you very much for this.

**Ex. 5 - Deliberative Process**

## **Ex. 5 - Deliberative Process**

4

I look forward to our discussion on Monday.

Thank you,

Rosario

Rosario Palmieri

Senior Counselor to the Administrator

Office of Information and Regulatory Affairs | Office of Management and Budget

O: [Ex. 6 - Personal Privacy] | m: [Ex. 6 - Personal Privacy] | e: [Ex. 6 - Personal Privacy]

**From:** Gunasekara, Mandy [<mailto:Gunasekara.Mandy@epa.gov>]

**Sent:** Friday, February 23, 2018 4:53 PM

**To:** Catanzaro, Michael J. EOP/WHO <[Ex. 6 - Personal Privacy]>  
Moran, John S. EOP/WHO <[Ex. 6 - Personal Privacy]> Szabo, Aaron L.  
EOP/CEQ <[Ex. 6 - Personal Privacy]> Palmieri, Rosario A. EOP/OMB

**Cc:** wenrum, Bill <[Wenrum.Bill@epa.gov](mailto:Wenrum.Bill@epa.gov)>; Harlow, David  
<[harlow.david@epa.gov](mailto:harlow.david@epa.gov)>

**Subject:** NSR Memo

Hi All:

Attached is the latest and close to final draft of OAR's NSR Project Emissions Accounting (formerly known as "project netting") Memo. Please review and let us know of any concerns/feedback. We are working to get this out by Wednesday in order to comport with our once a month goal.

Our comms team is developing messaging and roll-out. I can send that your way once complete.

Best,

Mandy

**Mandy M. Gunasekara**

Principal Deputy Assistant Administrator

Office of Air and Radiation

US Environmental Protection Agency

**To:** Gunasekara, Mandy[Gunasekara.Mandy@epa.gov]  
**Cc:** Dominguez, Alexander[dominguez.alexander@epa.gov]; Dunham, Sarah[Dunham.Sarah@epa.gov]  
**From:** Lewis, Josh  
**Sent:** Thur 10/5/2017 4:42:01 PM  
**Subject:** Fwd: NSR Policy Memo  
[OGC NSR DTE issue options analysis 10-4 am draft.docx](#)  
[ATT00001.htm](#)  
[NSR policy memo\\_draft 10-4-17PSLrev.docx](#)  
[ATT00002.htm](#)

Ahead of our weekly meeting tomorrow at 9, wanted to send the latest draft NSR policy memo. The other attachment is a document prepared by OGC which is an analysis of options for addressing NSR issues raised by DTE (you'll see one of the options is the policy memo)

## Ex. 5 - Deliberative Process

OGC staff attorneys have reviewed this draft. The draft will go shortly to Justin, Lorie, and Gautam for review. Thus far OECA and the Regional Offices have not been engaged.

We can talk more tomorrow about this, including next steps.

**To:** Wehrum, Bill[Wehrum.Bill@epa.gov]; Gunasekara, Mandy[Gunasekara.Mandy@epa.gov]  
**Cc:** Dominguez, Alexander[dominguez.alexander@epa.gov]  
**From:** Harlow, David  
**Sent:** Wed 2/28/2018 10:26:02 PM  
**Subject:** FW: Revised draft of guidance memorandum  
[dsh Rev Project Emissions Accounting Guidance Memorandum .docx](#)  
[dsh Rev CLEAN Project Emissions Accounting Guidance Memorandum.docx](#)

For awareness, and by way of something of a status report.

**David S. Harlow**  
**Senior Counsel**

**Immediate Office of the Assistant Administrator**  
**Office of Air and Radiation, USEPA**  
**WJC-N Room 5409K**

**1200 Pennsylvania Avenue NW**  
**Washington, DC 20460**  
**202-564-1233**

[Harlow.David@epa.gov](mailto:Harlow.David@epa.gov)

**From:** Harlow, David  
**Sent:** Wednesday, February 28, 2018 5:25 PM  
**To:** Wood, Anna <Wood.Anna@epa.gov>; Harnett, Bill <Harnett.Bill@epa.gov>; Santiago, Juan <Santiago.Juan@epa.gov>; Rao, Raj <Rao.Raj@epa.gov>  
**Subject:** Revised draft of guidance memorandum

All,

## Ex. 5 - Deliberative Process

## **Ex. 5 - Deliberative Process**

# **Ex. 5 - Deliberative Process**

Thank you. I'll keep you posted on developments from this end.

**David S. Harlow**  
**Senior Counsel**

**Immediate Office of the Assistant Administrator**  
**Office of Air and Radiation, USEPA**  
**WJC-N Room 5409K**

**1200 Pennsylvania Avenue NW**  
**Washington, DC 20460**  
**202-564-1233**

[Harlow.David@epa.gov](mailto:Harlow.David@epa.gov)

**To:** Gunasekara, Mandy[Gunasekara.Mandy@epa.gov]  
**From:** Dominguez, Alexander  
**Sent:** Tue 3/13/2018 3:03:01 PM  
**Subject:** FW: FINAL: EPA Clarifies NSR Project Evaluations, Removes Obstacles to Reducing Pollution - Preview

Molly said she already gave OCIR/Tate heads up and they are all set for the release

**From:** Block, Molly  
**Sent:** Tuesday, March 13, 2018 11:01 AM  
**To:** Dominguez, Alexander <dominguez.alexander@epa.gov>  
**Subject:** FINAL: EPA Clarifies NSR Project Evaluations, Removes Obstacles to Reducing Pollution - Preview

## **EPA Clarifies NSR Project Evaluations, Removes Obstacles to Reducing Pollution**

*EPA to base emission control requirements on real world impacts*

**WASHINGTON** (March 13, 2018) — Today, Environmental Protection Agency (EPA) Administrator Scott Pruitt issued a guidance memorandum clarifying the process for evaluating projects under the major New Source Review (NSR) program. The memo streamlines permitting without sacrificing environmental protections, and reduces burdens to develop and expand facilities while encouraging companies to reduce pollution.

"Today's NSR guidance advances President Trump's goal to streamline permitting requirements for manufacturing facilities as well as EPA's efforts to reform the overly complicated and burdensome NSR program," **said EPA Administrator Scott Pruitt.**

"The memo outlines a common-sense interpretation of the New Source Review rules that will remove unnecessary administrative barriers to the construction of cleaner and more efficient facilities," **said EPA Office of Air and Radiation Assistant Administrator Bill Wehrum.** "This is an important step toward achieving better outcomes based on real world impacts."

NSR provisions require covered facilities to obtain a preconstruction permit prior to the construction of a new major stationary source or a "major modification" to an existing stationary source. Determining whether a proposed project triggers the threshold to obtain an NSR permit is a two-step process, which is laid out in the Agency's comprehensive "applicability procedures" regulatory requirements. Step 1 determines whether a proposed project will, by itself, result in a

significant emissions increase. If an increase is projected to occur, the process moves to Step 2 to determine whether the project, combined with other unrelated recent projects, will result in a significant net emissions increase.

Given previous inconsistent application and interpretation of the Step 1 evaluation accounting, this process has prevented environmentally beneficial projects from moving forward. The memo clarifies that companies can consider projected decreases in emissions of air pollution, as well as projected emissions increases, during Step 1. This removes regulatory obstacles, saves time and money, and reduces pollutants.

If the Step 1 evaluation shows that the proposed project will not result in a significant emissions increase, the project then proceeds under a state-issued minor source permit and avoids the complex multi-year evaluation to obtain a major NSR permit.

For more information see: <https://www.epa.gov/nsr/project-emissions-accounting>

### Background

The first step in reforming the NSR program came in December 2017, when Administrator Pruitt issued a [guidance memorandum](#) making clear the Agency will not “second guess” an owner or operator’s analysis, as long as it is done in a manner consistent with NSR requirements. It was followed by EPA Office of Air and Radiation Assistant Administrator Bill Wehrum’s memo withdrawing the “[once in always in](#)” policy, a major deterrent to improving environmental outcomes.

<http://usenvironmentalprotectionagency.cmail19.com/t/d-i-oijuuuk-l-t/>

Visit The EPA's  
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U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue Northwest  
Washington, D.C. 20004

[Unsubscribe](#)

**To:** Gunasekara, Mandy[Gunasekara.Mandy@epa.gov]  
**Cc:** Lewis, Josh[Lewis.Josh@epa.gov]  
**From:** Harlow, David  
**Sent:** Tue 3/13/2018 12:35:29 PM  
**Subject:** FW: Final PEA Memo has been entered into CMS  
Project Emissions Accounting Guidance Memorandum.FINAL 03-12-18 557pm.docx

Mandy,

It is my understanding that this is the final version.

David S. Harlow  
Senior Counsel  
Immediate Office of the Assistant Administrator  
Office of Air and Radiation, USEPA  
WJC-N Room 5409K  
1200 Pennsylvania Avenue NW  
Washington, DC 20460  
202-564-1233  
Harlow.David@epa.gov

-----Original Message-----

From: Long, Pam  
Sent: Monday, March 12, 2018 6:16 PM  
To: Wood, Anna <Wood.Anna@epa.gov>  
Cc: Lewis, Josh <Lewis.Josh@epa.gov>; Santiago, Juan <Santiago.Juan@epa.gov>; Harlow, David <harlow.david@epa.gov>; Rao, Raj <Rao.Raj@epa.gov>; Cortelyou-Lee, Jan <Cortelyou-Lee.Jan@epa.gov>  
Subject: Final PEA Memo has been entered into CMS

The CMS tracking # is OAR-18-000-5132.

I am attaching the version within CMS.

Let me know if you have any questions.

**To:** Wehrum, Bill[Wehrum.Bill@epa.gov]; Gunasekara, Mandy[Gunasekara.Mandy@epa.gov]; Harlow, David[harlow.david@epa.gov]  
**From:** Lewis, Josh  
**Sent:** Fri 3/9/2018 10:32:07 PM  
**Subject:** final version of the NSR memo (identical to what I just put in Bill's folder in hard copy)  
[Project Emissions Accounting Guidance Memorandum.FINAL.docx](#)

**From:** Whiteman, Chad S. EOP/OMB

**Location:** Dial-In: Ex. 6 - Personal Privacy Code: Ex. 6 - Personal Privacy

**Importance:** Normal

**Subject:** CONFIRMED: EPA NSR Memo Discussion

**Start Date/Time:** Fri 3/9/2018 5:30:00 PM

**End Date/Time:** Fri 3/9/2018 6:30:00 PM

FINAL Project Emissions Accounting Guidance Memorandum v5 - 3-8-18.docx

FINAL Project Emissions Accounting Guidance Memorandum v5 - 3-8-18 comments.docx

;

Attached is (1) EPA's most recent passback from Thursday (3/8) and (2) the EOP redline response document from 3/8 with the word 'comments' at the end of the document name.

**To:** Gunasekara, Mandy[Gunasekara.Mandy@epa.gov]  
**Cc:** Bolen, Brittany[bolen.brittany@epa.gov]  
**From:** Dravis, Samantha  
**Sent:** Thur 3/8/2018 11:37:26 PM  
**Subject:** Re: RE:

Ok. He left for the evening and not sure if I can get the auto pen tonight but if you need my help w that let me know

Sent from my iPad

> On Mar 8, 2018, at 6:36 PM, Gunasekara, Mandy <Gunasekara.Mandy@epa.gov> wrote:  
>  
> Hoping to get it signed tonight but will do a controlled roll out either tomorrow morning or afternoon.  
>  
> Sent from my iPhone  
>  
>> On Mar 8, 2018, at 5:46 PM, Dravis, Samantha <dravis.samantha@epa.gov> wrote:  
>>  
>> Never mind.  
>>  
>> Are we still hoping to get the memo out tonight?  
>>  
>> Sent from my iPhone  
>>  
>>> On Mar 8, 2018, at 5:23 PM, Gunasekara, Mandy <Gunasekara.Mandy@epa.gov> wrote:  
>>>  
>>> See attached. I just sent latest iteration of the press release to Liz for her input.  
>>>  
>>> -----Original Message-----  
>>> From: Dravis, Samantha  
>>> Sent: Thursday, March 8, 2018 5:22 PM  
>>> To: Gunasekara, Mandy <Gunasekara.Mandy@epa.gov>  
>>> Cc: Bolen, Brittany <bolen.brittany@epa.gov>  
>>> Subject:  
>>>  
>>> Hey can you include us please on the press release and coms plan for the memo  
>>>  
>>> Sent from my iPhone  
>>> <NSR PEA Memo\_COMMS Plan.docx>  
>>> <Project Netting Press Release\_DRAFT 2018 03 08.docx>

**To:** DeLuca, Isabel[DeLuca.Isabel@epa.gov]; Gunasekara, Mandy[Gunasekara.Mandy@epa.gov]; Millett, John[Millett.John@epa.gov]  
**From:** Lewis, Josh  
**Sent:** Thur 3/8/2018 10:34:23 PM  
**Subject:** RE: NSR Press Release

OEX has an email box they can send it from...we just have to let them know when to send (which we can determine in the morning)

Josh

**From:** DeLuca, Isabel  
**Sent:** Thursday, March 08, 2018 5:31 PM  
**To:** Gunasekara, Mandy <Gunasekara.Mandy@epa.gov>; Millett, John <Millett.John@epa.gov>  
**Cc:** Lewis, Josh <Lewis.Josh@epa.gov>  
**Subject:** RE: NSR Press Release

Ok, great, thanks. We'll work to post the memo as soon as we get a signed copy. Do you know who is planning to notify the RAs? Would they get a notification shortly before the announcement?

**From:** Gunasekara, Mandy  
**Sent:** Thursday, March 08, 2018 5:27 PM  
**To:** DeLuca, Isabel <DeLuca.Isabel@epa.gov>; Millett, John <Millett.John@epa.gov>  
**Cc:** Lewis, Josh <Lewis.Josh@epa.gov>  
**Subject:** RE: NSR Press Release

Yes – ideally we could rollout 10 or 11 am (I know that is pushing it especially since we may not have final sign-off from OMB until 10 am tomorrow morning) with a fall back of 2 pm.

**From:** DeLuca, Isabel  
**Sent:** Thursday, March 8, 2018 5:25 PM  
**To:** Gunasekara, Mandy <Gunasekara.Mandy@epa.gov>; Millett, John

<Millett.John@epa.gov>

**Cc:** Lewis, Josh <Lewis.Josh@epa.gov>

**Subject:** RE: NSR Press Release

Thanks, Mandy! About timing, would early afternoon work for the press release? If the memo is signed in the morning, that would give time to notify the RAs and post the memo online before the announcement.

**From:** Gunasekara, Mandy

**Sent:** Thursday, March 08, 2018 5:21 PM

**To:** DeLuca, Isabel <DeLuca.Isabel@epa.gov>; Millett, John <Millett.John@epa.gov>

**Subject:** NSR Press Release

Attached is the latest iteration of the NSR PEA Memo Press Release. I just sent a copy to Liz.

**Mandy M. Gunasekara**

Principal Deputy Assistant Administrator

Office of Air and Radiation

US Environmental Protection Agency

**To:** Gunasekara, Mandy[Gunasekara.Mandy@epa.gov]; Millett, John[Millett.John@epa.gov]  
**Cc:** Lewis, Josh[Lewis.Josh@epa.gov]  
**From:** DeLuca, Isabel  
**Sent:** Thur 3/8/2018 10:31:11 PM  
**Subject:** RE: NSR Press Release

Ok, great, thanks. We'll work to post the memo as soon as we get a signed copy. Do you know who is planning to notify the RAs? Would they get a notification shortly before the announcement?

**From:** Gunasekara, Mandy  
**Sent:** Thursday, March 08, 2018 5:27 PM  
**To:** DeLuca, Isabel <DeLuca.Isabel@epa.gov>; Millett, John <Millett.John@epa.gov>  
**Cc:** Lewis, Josh <Lewis.Josh@epa.gov>  
**Subject:** RE: NSR Press Release

Yes – ideally we could rollout 10 or 11 am (I know that is pushing it especially since we may not have final sign-off from OMB until 10 am tomorrow morning) with a fall back of 2 pm.

**From:** DeLuca, Isabel  
**Sent:** Thursday, March 8, 2018 5:25 PM  
**To:** Gunasekara, Mandy <Gunasekara.Mandy@epa.gov>; Millett, John <Millett.John@epa.gov>  
**Cc:** Lewis, Josh <Lewis.Josh@epa.gov>  
**Subject:** RE: NSR Press Release

Thanks, Mandy! About timing, would early afternoon work for the press release? If the memo is signed in the morning, that would give time to notify the RAs and post the memo online before the announcement.

**From:** Gunasekara, Mandy  
**Sent:** Thursday, March 08, 2018 5:21 PM  
**To:** DeLuca, Isabel <DeLuca.Isabel@epa.gov>; Millett, John <Millett.John@epa.gov>  
**Subject:** NSR Press Release

Attached is the latest iteration of the NSR PEA Memo Press Release. I just sent a copy to Liz.

**Mandy M. Gunasekara**

Principal Deputy Assistant Administrator

Office of Air and Radiation

US Environmental Protection Agency

**To:** Gunasekara, Mandy[Gunasekara.Mandy@epa.gov]; Millett, John[Millett.John@epa.gov]  
**Cc:** Lewis, Josh[Lewis.Josh@epa.gov]  
**From:** DeLuca, Isabel  
**Sent:** Thur 3/8/2018 10:25:20 PM  
**Subject:** RE: NSR Press Release  
Project Netting Press Release DRAFT 2018 03 08.docx

Thanks, Mandy! About timing, would early afternoon work for the press release? If the memo is signed in the morning, that would give time to notify the RAs and post the memo online before the announcement.

**From:** Gunasekara, Mandy  
**Sent:** Thursday, March 08, 2018 5:21 PM  
**To:** DeLuca, Isabel <DeLuca.Isabel@epa.gov>; Millett, John <Millett.John@epa.gov>  
**Subject:** NSR Press Release

Attached is the latest iteration of the NSR PEA Memo Press Release. I just sent a copy to Liz.

**Mandy M. Gunasekara**

Principal Deputy Assistant Administrator

Office of Air and Radiation

US Environmental Protection Agency

**To:** Gunasekara, Mandy[Gunasekara.Mandy@epa.gov]  
**From:** Harlow, David  
**Sent:** Tue 2/27/2018 7:12:44 PM  
**Subject:** RE: NSR reform

Thanks. Tim Hunt had actually sent this to me a week or so ago. I guess he never told Paul.

**David S. Harlow**  
**Senior Counsel**

**Immediate Office of the Assistant Administrator**  
**Office of Air and Radiation, USEPA**  
**WJC-N Room 5409K**

**1200 Pennsylvania Avenue NW**  
**Washington, DC 20460**  
**202-564-1233**

[Harlow.David@epa.gov](mailto:Harlow.David@epa.gov)

**From:** Gunasekara, Mandy  
**Sent:** Tuesday, February 27, 2018 2:11 PM  
**To:** Harlow, David <harlow.david@epa.gov>  
**Subject:** Fwd: NSR reform

The attached is just FYI: Paul Noe testified at E&C and wanted to share with us his vision of priorities.

Sent from my iPhone

Begin forwarded message:

**From:** "Noe, Paul" <[Paul\\_Noe@afandpa.org](mailto:Paul_Noe@afandpa.org)>  
**Date:** February 27, 2018 at 2:04:23 PM EST

**To:** "Mandy Gunasekara ([Gunasekara.Mandy@Epa.gov](mailto:Gunasekara.Mandy@Epa.gov))" <[Gunasekara.Mandy@Epa.gov](mailto:Gunasekara.Mandy@Epa.gov)>  
**Subject:** NSR reform

Dear Mandy:

FYI, attached is my oral statement and more detailed written testimony from the recent NSR reform hearing before the House E&C Environment Subcommittee. We laid out support for specific reforms, such as realistic project emissions accounting and use of realistic, probabilistic air quality modeling approaches, and provided examples of why NSR reform is needed.

Best regards,

Paul

**Paul Noe**

Vice President for Public Policy

[Paul\\_Noel@afandpa.org](mailto:Paul_Noel@afandpa.org)

(202) 463-2777

AMERICAN FOREST & PAPER ASSOCIATION

1101 K Street, N.W., Suite 700

Washington, D.C. 20005

**To:** Gunasekara, Mandy[Gunasekara.Mandy@epa.gov]  
**From:** Noe, Paul  
**Sent:** Tue 2/27/2018 7:04:23 PM  
**Subject:** NSR reform  
[Paul Noe's NSR Oral Statement House EC 2-14-18.pdf](#)  
[Paul Noe's NSR Testimony House E&C 2-14-18.pdf](#)

Dear Mandy:

FYI, attached is my oral statement and more detailed written testimony from the recent NSR reform hearing before the House E&C Environment Subcommittee. We laid out support for specific reforms, such as realistic project emissions accounting and use of realistic, probabilistic air quality modeling approaches, and provided examples of why NSR reform is needed.

Best regards,

Paul

**Paul Noe**

Vice President for Public Policy

[Paul\\_Noe@afandpa.org](mailto:Paul_Noe@afandpa.org)

(202) 463-2777

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1101 K Street, N.W., Suite 700

Washington, D.C. 20005







**American  
Forest & Paper  
Association**



AMERICAN WOOD COUNCIL

**Oral Statement of Paul Noe for AF&PA and AWC before  
House Committee on Energy and Commerce, Subcommittee on Environment  
Hearing on  
“New Source Review Permitting Challenges for Manufacturing and Infrastructure”  
February 14, 2018**

Chairman Shimkus, Ranking Member Tonko, and distinguished members of the Committee, my name is Paul Noe, and I am the Vice President of Public Policy for the American Forest & Paper Association and American Wood Council. Thank you for the opportunity to provide you the forest product industry’s perspectives on the challenges posed by EPA’s New Source Review permit program and how it can be improved. This is consistent with the twin purposes of the Clean Air Act to promote public health and welfare, as well as the productive capacity of our nation.<sup>1</sup>

Unfortunately, NSR is an outdated, inefficient and slow regulatory approach that currently just doesn’t work very well for existing sources and is impeding modernization and growth in the U.S. manufacturing sector. It doesn’t makes sense to discourage upgrading plants already subject to a myriad of other regulatory requirements, or to block beneficial projects using best controls simply due to unrealistic air quality modeling and assumptions. Our country has made great strides in improving air quality, largely under other programs. To borrow from my friend and former EPA General Counsel, Don Elliott, when he testified before Congress over 15 years ago, “NSR is slow, costly and ineffective – and those are the kindest things that one can say about it! It is the least successful of all the programs under the Clean Air Act.”

The reality is that energy efficiency and modernization projects for existing sources are delayed, modified or thwarted by complex NSR interpretations that have accumulated and evolved over time. The program requires

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<sup>1</sup> CAA Sec. 101(b), 42 USC 7401(b).

expensive but unrealistic air modeling that frequently delays projects and can cost \$100,000 or more to complete. Unreasonable permitting delays tie up investment capital and undermine the economic benefits from expansion projects.

There are many ways EPA could improve the permit process, but let me focus on two key points: First, consistent with the statute, EPA should focus the NSR program on larger projects that have a greater potential to impact air quality. Changing the NSR applicability criteria could reduce unnecessary workload on permitting agencies and create business certainty and positive incentives without jeopardizing air quality.

For example, currently, the NSR regulations use a two-step calculation process to determine if a project is subject to NSR. The emission increases from the project are calculated first to see if they are significant before any decreases are subtracted. This “step 1,” then “step 2” analysis is complicated, expensive and time-consuming. By simply allowing increases and decreases to be “netted,” projects with emissions below significance levels could proceed.

Second, once a project triggers a higher level of scrutiny, EPA should use realistic assumptions and analytic tools, including probabilistic air quality modeling approaches. This is needed now more than ever for permitting -- because there is little room for error. This is because in recent years, EPA has lowered National Ambient Air Quality Standards (or “NAAQS”) close to background levels. This has left little room for permits, even in attainment areas. In the past, when the NAAQS for PM<sub>2.5</sub>, NO<sub>2</sub>, and SO<sub>2</sub> were higher, there was sufficient margin -- or “headroom” -- between the NAAQS level vs. the ambient background levels, emissions from surrounding sources, plus the facility’s emissions.

The problem is seriously exacerbated because many of EPA’s current policy approaches and modeling tools significantly over-predict impacts from facilities, especially when a series of unrealistic assumptions are compounded. It is critical that modelling results reflect the reality of local air quality.

For example, EPA's current modeling guidelines have an expansive interpretation of where the general public must be protected from nearby plant emissions. Rather than focusing on where people actually are, it is assumed that "ambient air" is anywhere a person theoretically could be – such as by illegally trespassing at the facility or being where the general public could not in reality be, such as standing on a roadway or railway. Overly conservative modeling analysis can lead to unverifiable and nonexistent concentration estimates that cause costly changes or cancellations of beneficial projects, even though real-world exposure of the general public at these locations is minimal, improbable, or even impossible. Therefore, EPA should issue new guidance to update its policies for placing receptors considering natural, man-made, or jurisdictional barriers.

Although forest product mills typically are located in attainment areas with better quality air, they can face permit problems as soon as new NAAQS are issued. This is because, under the PSD program, new NAAQS are immediately effective and must be considered when undertaking modeling for a major facility modification – even before EPA formally designates which areas are in attainment or nonattainment. Compounding the confusion and delay, EPA has not provided implementation and modeling guidance until after revising NAAQS.

In enacting the Clean Air Act, I don't think Congress intended to create such an arcane NSR permitting system using unrealistic assumptions and modeling as manufacturers strive to innovate and grow. AF&PA and AWC urge this committee to work with EPA to reform the NSR and PSD programs so beneficial projects that are minor are excluded -- and those with significant emissions increases are assessed using realistic air quality modeling and assumptions. Our shared goal should be sustainable regulation – regulation that addresses environmental and economic needs. I believe there is no better place for a robust manufacturing sector than the United States, which has highly productive workers, creative entrepreneurs and innovators, abundant resources, a strong free-market democracy, and regulatory agencies capable of leading the world on sustainable regulation.



**American  
Forest & Paper  
Association**



AMERICAN WOOD COUNCIL

**Testimony of Paul Noe for  
American Forest & Paper Association  
and American Wood Council before  
House Committee on Energy and Commerce  
Subcommittee on Environment  
Oversight Hearing on  
“New Source Review Permitting Challenges for  
Manufacturing and Infrastructure”  
February 14, 2018**

My name is Paul Noe, and I am the Vice President of Public Policy for the American Forest & Paper Association and American Wood Council. I want to thank the Subcommittee for the opportunity to provide the forest product industry’s perspectives on the challenges posed by EPA’s New Source Review Program and how it can be improved – consistent with the twin purposes of the Clean Air Act to promote public health and welfare, as well the productive capacity of the nation.<sup>1</sup>

The American Forest & Paper Association (AF&PA) serves to advance a sustainable U.S. pulp, paper, packaging, tissue and wood products manufacturing industry through fact-based public policy and marketplace advocacy. AF&PA member companies make products essential for everyday life from renewable and recyclable resources and are committed to continuous improvement through the industry’s sustainability initiative - *Better Practices, Better Planet 2020*. The forest products industry accounts for approximately four percent of the total U.S. manufacturing GDP, manufactures over \$200 billion in products annually, and employs approximately 900,000 men and women. The industry meets a payroll of approximately \$50 billion annually and is among the top 10 manufacturing sector employers in 45 states.

AF&PA’s sustainability initiative - *Better Practices, Better Planet 2020* - comprises one of the most extensive quantifiable sets of sustainability goals for a U.S. manufacturing industry and is the latest example of our members’ proactive

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<sup>1</sup> Clean Air Act, Sec. 101(b), 42 USC 7401(b).

commitment to the long-term success of our industry, our communities and our environment. We have long been responsible stewards of our planet's resources. We are proud to report that our members have already achieved the greenhouse gas reduction and workplace safety goals. Our member companies have also collectively made significant progress in each of the following goals: increasing paper recovery for recycling; improving energy efficiency; promoting sustainable forestry practices; and reducing water use.

The **American Wood Council (AWC)** is the voice of North American wood products manufacturing, an industry that provides approximately 400,000 men and women in the United States with family-wage jobs. AWC represents 86 percent of the structural wood products industry, and members make products that are essential to everyday life from a renewable resource that absorbs and sequesters carbon. Staff experts develop state-of-the-art engineering data, technology, and standards for wood products to assure their safe and efficient design, as well as provide information on wood design, green building, and environmental regulations. AWC also advocates for balanced government policies that affect wood products.

## **Overview**

EPA's complex New Source Review (NSR) air permit program affects practically every major manufacturing facility in the United States, and unfortunately, it has become a significant impediment to the modernization and growth of the U.S. manufacturing sector.<sup>2</sup> U.S. air permitting and regulatory requirements are out of date, overly conservative, rigid, and time-consuming. The air quality permitting process for new and modified facilities is slow and cumbersome and relies on unrealistic modeling and assumptions, resulting in unnecessary delays, costs and impediments for projects that would benefit both our economy and our environment.

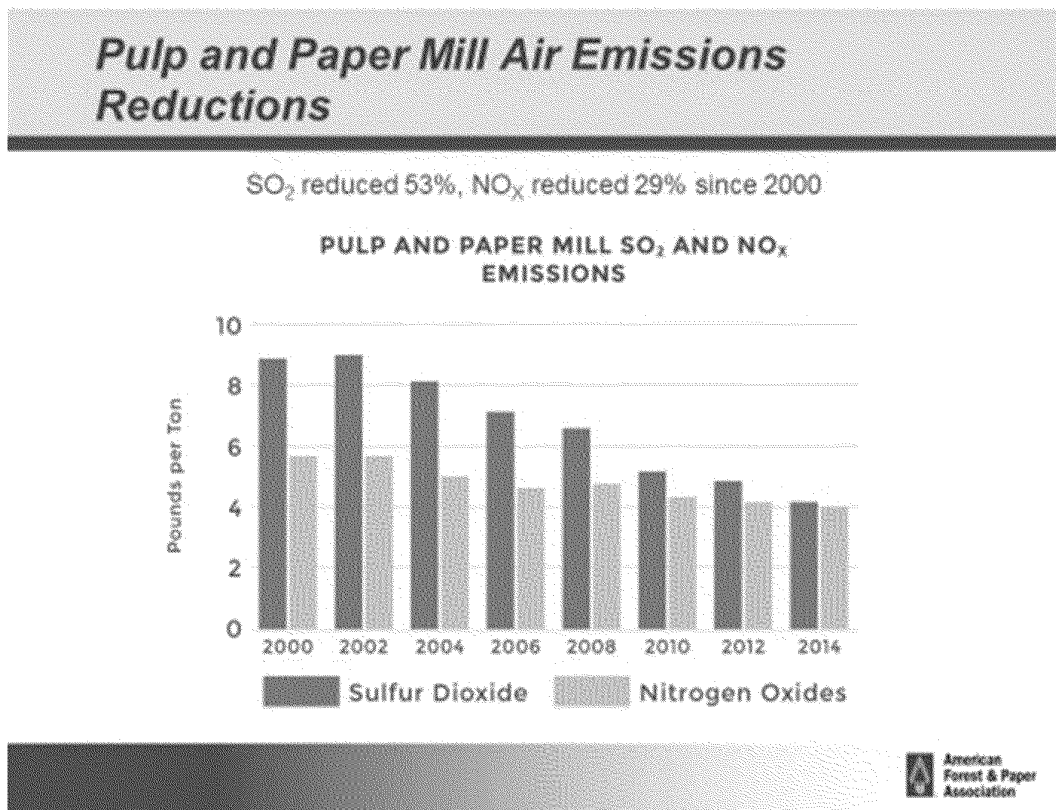
Recently, this problem has become more acute with substantial tightening of EPA's National Ambient Air Quality Standards (NAAQS) closer to ambient background levels. Simply put, when stringent NAAQS are combined with unrealistic air quality modeling and assumptions, there is little or no "headroom" for new or modified facilities in many areas to show that their residual emissions will not contribute to a violation of the NAAQS, even after the installation of the best available pollution control technology.<sup>3</sup>

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<sup>2</sup> See, e.g., Art Fraas, John D. Graham, and Jeff Holmstead, "EPA's New Source Review Program: Time for Reform?," 47 E.L.R. 10026 (Jan. 2017).

<sup>3</sup> Id.

Manufacturing is one of the most heavily regulated sectors in the U.S. economy. Since 1981, manufacturers have been subject to over 2,200 different regulations, and almost half were from EPA.<sup>4</sup> The manufacturing sector has made large investments in air quality improvements. Air quality in the U.S. has improved markedly over the past 30 years, even as the population has grown. In the pulp and paper industry, for example, SO<sub>2</sub> emissions have been reduced by over 50% since 2000, and NO<sub>x</sub> emissions have been reduced by almost 30% in that same timeframe.



Source: [AF&PA 2016 Sustainability Report](#)

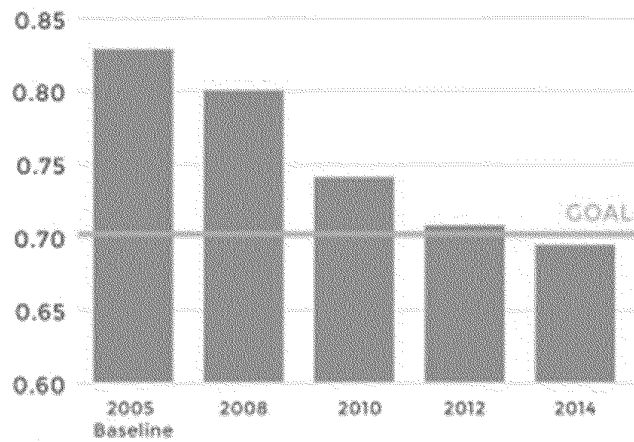
In another measure of environmental progress, AF&PA member companies have already met their voluntary Better Practices, Better Planet sustainability goal to reduce greenhouse gas emissions by 15% from a 2005 baseline -- six years ahead of schedule.

<sup>4</sup> See Paul Bernstein et al., *Macroeconomic Impacts of Federal Regulation of the Manufacturing Sector* (NERA Economic Consulting & Manufacturing Alliance for Productivity and Innovation) 2012

## Greenhouse Gas Reduction Goal Progress

Greenhouse gas emissions intensity decreased by 16%,  
surpassing our goal of a 15% reduction by 2020

### GREENHOUSE GAS EMISSIONS GOAL



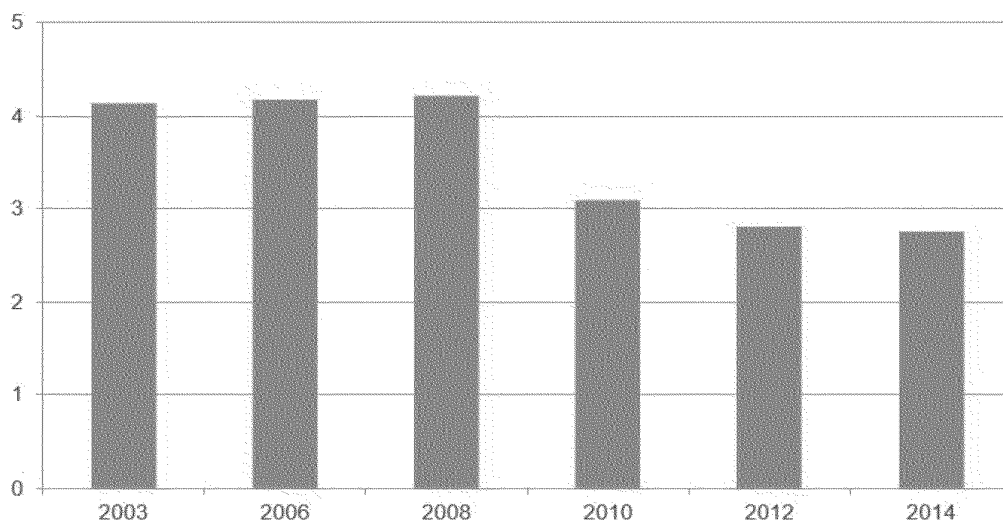
Source: [AF&PA 2016 Sustainability Report](#)

Methanol emissions intensity, expressed in pounds per thousand cubic feet of wood products produced by AWC member companies, has declined 34% from 2008 to 2014. Formaldehyde emissions have dropped almost 60% from 2006 to 2014.

## Chart 2: Methanol Releases Intensity



Pounds per 1,000 Cubic feet of production



Source: [AWC 2016 Industry Progress Report](#)

These and other emission reductions come at a high cost. The forest products industry has invested about \$1 billion to comply with EPA's 2013 Boiler MACT regulation, and those emission reduction benefits will be reflected in future AF&PA and AWC reports. All told, several billion dollars have been spent on Clean Air Act obligations by the forest products industry in the last two decades, contributing to the impressive emissions reductions our nation has achieved.

The NSR permit program was established under the Clean Air Act in 1977 to require new facilities as well as existing facilities that undertake *significant modifications* to update their pollution control systems to current standards. Unfortunately, some important parts of NSR that are aimed at existing sources, particularly its Prevention of Significant Deterioration (PSD) program, can undermine the laudable goals of the Clean Air Act. Energy efficiency and modernization projects are being delayed or thwarted by NSR interpretations that have evolved over time. The program requires expensive emissions assessments and air modeling that frequently delays projects and can cost \$100,000 per project or more to complete. It also easily can take 12 to 18 months to obtain NSR permits, tying up investment capital and delaying the economic benefits from expansion projects. Finally, the permitting process itself can lead to lawsuits by environmental organizations—not just during NSR but again during renewal of the

facility's Title V operating permit, assuming the manufacturer actually gets the permit.

We believe there are many actions the EPA could take to improve the process that regulated entities must go through to secure air permits and comply with federal air quality regulations. This testimony focuses on several aspects of the NSR and PSD programs. Our suggested solutions to the problems identified would promote growth and jobs in domestic manufacturing industries and our economy while protecting against actual risks to the environment and public health.

The permitting program under the Clean Air Act needs a substantial re-examination since it has evolved over time in a rather haphazard and incremental manner. First, consistent with the statute, EPA should focus the NSR program on larger projects that have a greater potential to impact air quality. Changing the NSR applicability criteria could reduce unnecessary workloads on permitting agencies and create business certainty and incentives without jeopardizing air quality. Second, once a project triggers a higher level of scrutiny, EPA should use real-world assumptions and modern, realistic air quality modeling tools, including probabilistic air quality models, instead of the deterministic, upper-bound modeling assumptions currently used.

As a group, the complicated and burdensome set of air quality rules surrounding NSR and PSD permitting are a deterrent to manufacturing facility modifications and expansions. The current set of air quality permitting requirements even deters implementation of projects that would reduce emissions and/or enhance energy efficiency. Part of what makes implementing these regulations so difficult is the thousands of pages of complex, prescriptive guidance. EPA should establish a new permitting process and adjust its modeling criteria to be more reflective of actual impacts. Regulatory air quality models now have the capability to predict ambient air concentrations based on variable emissions, background, and meteorological conditions. Unfortunately, long-standing policies are obsolete and preclude the use of modern approaches that take variability into account. Simply stated, implementation of stringent new air quality standards has outpaced reliable implementation tools and appropriate guidance, which remain years behind current knowledge. EPA should address the rapidly developing air permitting gridlock by adopting more flexible policies to allow use of more realistic emissions and modeling data.<sup>5</sup> In addition, states should be given more discretion

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<sup>5</sup> In the future, EPA also should not revise current NAAQS unless evidence shows a significant public health concern and previous NAAQS revisions have been fully implemented. Moving these multiple regulatory goal posts every five years creates significant business investment uncertainty

in running their permitting programs including advancing new tools, models and permitting approaches through guidance to the states and Regional Administrators.

### **New Source Review Problems and Solutions**

EPA previously developed proposed rules<sup>6</sup> – some were even finalized but indefinitely stayed and never implemented – that would add common sense tests for determining which projects would actually cause significant emissions increases. Such projects are subject to major source/modification permitting and their exclusion would eliminate resource-consuming reviews for routine projects and those that would not cause a significant emissions increase.

We have several suggested revisions to the NSR permitting program to address real world problems.

### **Actual Emissions Increase**

The NSR regulations use a two-step calculation process to determine if a project is subject to NSR. This test, also known as the applicability analysis, consists of determining (1) whether the project itself produces a “significant emission increase,” and, if so, (2) whether the project’s emission increase, netted with all other emissions increases and decreases occurring at the facility during the “contemporaneous” period, results in a “significant net emissions increase.” Only if the project will result in a significant emission increase in Step 1 must the source proceed to Step 2, where the source evaluates its plant-wide emissions over a time period, usually five years preceding the proposed project.

There is significant ambiguity and confusion regarding EPA’s emissions accounting regulations that have forced companies to consider only the project’s emission *increases* in “Step 1” and ignore emission *decreases* until Step 2 after significant resources have been expended and time lost. And in Step 2, decreases are evaluated only in the “plant-wide netting” process, which looks at the plant-wide emissions increases and decreases over time. Although some projects can easily use “plant-wide netting” to demonstrate that NSR is not triggered, at a large plant with complex operations, netting is an onerous, technically challenging calculation process that is taxing on state regulators and can create substantial confusion for those trying to analyze a proposed permit.

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when the air quality in the U.S. is some of the best in the world and will continue to get better under current programs and trends. A ten year NAAQS review cycle would be much more appropriate.

<sup>6</sup> <https://www.epa.gov/nsr/nsr-regulatory-actions#general>.

In recent years, EPA has issued guidance documents stating that emission decreases associated with a particular project cannot be counted in the Step 1 portion of an applicability analysis. The complexity of the Step 2 analysis for many plants means that companies will simply forgo environmentally beneficial projects that involve counting decreases in order to demonstrate that NSR is not triggered. Furthermore, as pointed out in the 2006 proposed regulation preamble, the approach of only counting increases at Step 1 fails to accurately reflect the effects of a project and that NSR only be triggered for projects that actually cause a significant emissions increase.

EPA should finalize the September 14, 2006 proposal to allow accounting for the complete effects (both increases and decreases in emissions) of a project for PSD applicability analyses. This proposal stated that all emissions changes, both increases and decreases that occur within the scope of the project would get counted under “step 1” of the applicability analysis. Project netting calculations are more straightforward than facility-wide netting and the resulting regulatory change to explicitly allow project netting would let facilities receive credit for emission reductions that are achieved as part of an overall project, without introducing complexity into the program. As a stopgap measure, EPA could issue guidance interpreting the current regulations “sum of the difference” language as considering both increases and decreases in Step 1.

### **Contemporaneous Project Classification**

Current EPA policy calls for the emissions impact of contemporaneous projects in netting transactions to be quantified using the actual-to-potential (ATP) test. This is required even if those projects relied on the actual-to-projected actual (ATPA) emissions comparison for their initial PSD applicability determination. EPA explains<sup>7</sup> that this restriction on the use of the ATPA comparison for netting purposes is mandated because the amended definition of “actual emissions” in the 2002 NSR Reform rule does not apply when assessing whether a significant net emissions increase has occurred or will occur for PSD purposes.

This policy is overly conservative and restrictive. The definition of a “net emissions increase” under PSD requires that an assessment be made of the increases and decreases of contemporaneous “actual emissions”; the plain language of “actual” emissions would suggest that the net emission changes (if any) that have actually

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<sup>7</sup> Letter from Cheryl L. Newton, EPA Region V Air and Radiation Division Director, to Keith Baugues, Indiana Department of Environmental Management, April 4, 2011.

occurred are to be the basis of this determination. We recognize that there are some netting assessment instances where a contemporaneous project has not begun normal operations, and in those instances it seems clear that the actual increase in emissions cannot yet be defined. For these situations, the definition of “actual emissions” at 40 CFR 52.21(b)(21)(iv) (i.e., the presumption that a unit’s post-change actual emissions are equal to its potential-to-emit) would appropriately apply.

In most instances, however, the increases in emissions that actually occur as a result of projects are less than what is estimated during preconstruction review. It is overly restrictive and it does not serve any compelling purpose to require an ATP emissions comparison for projects where the actual-to-actual emissions history can be established. Accordingly, we encourage EPA to rescind the 2011 policy memo that requires the ATP emissions test for contemporaneous projects in netting transactions, and to promulgate changes to the appropriate definitions within the PSD regulations.

### **Project Aggregation**

NSR pre-construction permitting applies to “major modifications” to existing “major sources” that result in “significant” emission increases. Most companies perform dozens of changes/projects at a plant over one to three years. While many of these are exempt from NSR because they are routine maintenance, repair and replacement projects, some do not trigger NSR because they do not individually result in a significant emissions increase. EPA, however, is concerned about companies circumventing NSR by “dividing,” “phasing” or “tiering” projects that are technically or financially interdependent.

For this concern, the agency applies its “project aggregation” policy to determine when emissions increases from multiple projects at the same major source should be aggregated or summed to determine if together they constitute a “significant” emission increase triggering “major modification” NSR. In 1993, EPA enforcement concluded that 3M had circumvented NSR permitting when it constructed four separate R&D pilot projects at its Maplewood, MN plant. “3M Maplewood” established a very restrictive four factor aggregation policy that considers time between projects, funding and consumer demand, EPA’s assessment of the economic relationship between projects, and “the overall basic purpose of the plant.”

Thus, aggregation has become a presumption for groups of projects that occur close together in time, even though from a business perspective most decisions

and projects are independent of each other. This interpretation that unrelated projects get “aggregated” regardless of their true inter-relatedness places undue permitting burdens on facilities for smaller projects that should be allowed to begin construction without added red tape.

EPA began moving down the right path when it proposed changes to the PSD regulations on September 14, 2006 involving aggregation that were finalized in January 2009. The rule described factors for distinguishing “separate” and “substantially related” projects such as “technical” and/or “economic dependence.” However, that rule was stayed by the Obama Administration and then stayed again in 2010 along with a proposal to revoke the final rule. No final action was taken on the stay and revocation. We suggest that EPA withdraw the 2010 proposal and lift the stay on the 2009 rule to make it effective and replace the “3M Maplewood” framework for unrelated projects.

### **Plant-wide Applicability Limits (PALs)**

PAL provisions were established in the 2002 NSR Reform Rules in order to provide facilities with a simplified process for approval of physical or operational changes under the NSR rules, as long as facility-wide actual emissions remain below the PAL after the change.

The regulated community has not taken advantage of the flexibility afforded by these provisions because of unnecessary requirements that were included in the PAL regulations. Concern exists that PAL caps can be re-opened and reduced at any time. These concerns create huge uncertainty for sources. The PAL expiration and PAL renewal provisions have prevented facilities from utilizing PALs more. Some states issue separate PAL permits making the program more complicated instead of incorporating PAL provisions into the Title V permit and harmonizing monitoring requirements.

EPA can unlock the potential of PALs to reduce permitting burdens and create incentives to keep emissions at a capped level. EPA should issue guidance to clarify with permitting authorities that they should incorporate the PAL requirements into a facility’s Title V permit and that a PAL may be renewed at the same level, regardless of whether actual emissions are below the PAL level. In addition, EPA should make the PAL provisions more attractive to the regulated community by (1) clarifying there are only limited events that trigger review of the PAL cap during the PAL permit cycle, (2) encouraging states to incorporate PALs into Title V permits to establish a coordinated PAL/Title V permit, (3) harmonizing reporting and

recordkeeping to reduce administrative burden, and (4) removing penalties for terminating a PAL.

### **Streamlining Permitting Programs**

EPA has lowered the PM<sub>2.5</sub>, NO<sub>2</sub>, and SO<sub>2</sub> National Ambient Air Quality Standards (NAAQS) in the last eight years. States have responsibilities to evaluate air quality data, determine which areas of their states are in non-attainment and adopt State Implementation Plans (SIPs) requiring emission reductions needed to attain the relevant standards. In addition, SIPs establish and implement regulatory programs such as PSD permitting programs to ensure that areas currently meeting the NAAQS continue to do so. In addition to requiring best available control technologies to be applied at sources seeking approval to significantly increase emissions, the SIP permitting regulations require applicants to conduct Air Quality Analyses involving application of computer models to predict how the proposed emission increases could potentially affect ambient pollutant concentrations.

Modeling results are relied on as the technical basis for judgments on whether a proposed project will protect or threaten the NAAQS. Separately, facilities must model attainment of the NAAQS through the PSD process or under state-specific programs when making a modification or building a new source that increases emissions in attainment areas. Forest Products Industry (FPI) facilities are located predominantly in attainment areas but are subject to thorough air quality reviews for projects and sometimes upon permit renewal.

Air emissions from our industry have been regulated for many years and our sources are subject to multiple types of air quality standards that are the backbone of the Clean Air Act and will remain in place. As mentioned previously, industrial boilers are subject to EPA's stringent Boiler MACT requirements<sup>8</sup> while smaller boilers must comply with the 2013 Boiler Generally Achievable Control Technology (GACT) rule. All parts of pulp and paper mills are subject to the so called "Cluster Rule" that paired dramatic air emission reductions with stringent water quality limits and transformed bleaching systems at mills. In 2012 and again in 2017, EPA confirmed that the Cluster Rule had mitigated health risks to acceptable levels and that the emission control technologies deployed remain the best available. At wood product mills, the 2003 Plywood and Composite Wood Product (PCWP) MACT required 90% reductions in emissions from most presses and dryers. EPA is in the process of updating these MACT regulations and completing a separate residual

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<sup>8</sup> EPA is in the process of reviewing parts of the Boiler MACT regulation that could impose even more emission reductions on our facilities, and then it still has to conduct its risk and technology review.

risk and technology review (RTR) in the next couple of years that will cover additional mills. On top of these major rules, MACT regulations are in place for engines, turbines, and various coating operations at forest product mills.

For criteria pollutants, New Source Performance Standards (NSPS) for Kraft Pulp Mills and Boilers are in place and reviewed periodically. Many facilities were also subject to the Best Available Retrofit Control Technology (BART) regional haze program that reduced emissions from SO<sub>2</sub>, NO<sub>x</sub>, and PM that could impact visibility in nearby parks and wilderness areas. Finally, there are many SIPs that impose Best Available Control Technology (BACT) or Lowest Achievable Emission Rate (LAER) controls on sources as a result of local air quality concerns. Occasionally, EPA imposes region-wide requirements into SIPs such as the NO<sub>x</sub> SIP Call or interstate pollutant transport rules that can impact stationary sources in upwind states.

In the past, when the NAAQS were higher, there was sufficient margin or “headroom” between the NAAQS level vs. the ambient background levels, and the facility’s emissions plus those of surrounding sources. With that headroom, and for expediency, the Agency built multiple layers of conservatism into a NAAQS analysis. This approach was not problematic in most cases for decades. Now, however, the headroom has shrunk or disappeared as standards approach background levels (for some pollutants, the ambient background concentration is 75% or more of the NAAQS), so it is critical to carefully consider the overly-conservative assumptions and procedures required in the permitting and modeling processes. And to make matters even worse, emission offsets are limited in the rural areas where forest product mills operate.

Industry has found that many of the current policy approaches – which were initially formulated and implemented several decades ago - and deterministic, upper-bound computer modeling tools significantly over-predict impacts from their facilities, especially when results of making conservative (and often unrealistic) assumptions are compounded. Thus, the computer modelling results are overly conservative and produce unrealistic predictions of actual local air quality impacts. Let me highlight two areas where modernization of the PSD program is sorely needed.

### **Realistic Placement of Receptors: Ambient Air**

The current computer modeling guidelines rely on the definition of “ambient air” to determine where in the vicinity of a major source the emissions impact from a project must be evaluated. At these “ambient receptors”, computer modeling is

conducted to determine if a project will cause or contribute to a predicted violation of a NAAQS or PSD Increment. Neither the NSR regulations nor the modeling guidelines define “ambient air,” but instead use the definition in 40 CFR § 50.1(e) – “that portion of the atmosphere, external to buildings, to which the general public has access.” Historically, EPA defined “access” as the right or ability to enter, and the “general public” to be the “community at large” in implementing its ambient air definition.<sup>9</sup> In more than 40 years of implementation, EPA has issued guidance through numerous memoranda, permit determinations, and comments that expanded the original interpretation of general public and restricted its original interpretation of access. Moreover, the form of the NAAQS are now based on a probabilistic approach (e.g., 4<sup>th</sup> highest over 3 years), which is not considered within the existing ambient air definition or EPA’s modeling guideline. These changes result in excessively conservative assumptions that unrealistically simulate the location, frequency, and duration of modeled exposures.

EPA’s modeling guidelines, based on its ambient air policy, are excessively conservative because they go beyond the regulatory definition of ambient air. They require industry to evaluate impacts anywhere that any person could theoretically access (even by illegally trespassing) rather than considering only locations to which the general public legitimately and realistically has access. The policy also requires assessments at locations where the general public would not reasonably be exposed (e.g., on facility property, on a waterway, roadway, railway, or steep terrain) for the duration or averaging time of the current NAAQS. An overly conservative modeling analysis can lead to unverifiable and non-existing concentration estimates that can necessitate costly project changes or cancellation of beneficial projects even though possible exposure of the general public at these locations is minimal, improbable, or impossible. In practice, the unrealistic technical modeling analysis can force changes to a project’s design or emissions control when true air quality impacts are minimal. .

Although prior EPA ambient air policy has disregarded the frequency and duration of exposure, the current NAAQS differ from historical NAAQS in that they are inherently linked to the probability of exposure and apply over a wide range of averaging periods (i.e., 1-hour to annual), making a “one-size fits all” approach for defining receptor location under the modeling policy unreasonable and obsolete. In addition, fear of being second guessed by EPA prevents states from making

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<sup>9</sup> See memorandum from Walter C. Barber, Office of Air Quality Planning and Standards to Gordon M. Rapiere, air and Hazardous Materials Division, Region II, “Applicability of PSD Increments over Company property,” May 23, 1977.

common sense judgments about modeled receptor locations consistent with their broader overarching purpose of protecting public health.

EPA should issue new guidance to update its policies for air quality modeling to embrace the concept that site-specific circumstances should be used in placing receptors considering natural, man-made, or jurisdictional barriers that preclude exposure to the general public for a duration that might cause harm. Such policies would emphasize that permit modeling is a technical analysis as part of a PSD permit application, which is intended to balance economic growth and environmental protection. It is therefore reasonable within the decision-making process to consider the frequency and duration of potential exposures (consistent with the probabilistic form of the current NAAQS) and effective mechanisms for access restriction.

Modeling receptors should not be located where general public exposure at a site is objectively unrealistic, such as, within a plant's fence line or posted property boundary. "Access" should be interpreted such that receptors should not be placed at locations where the general public would become trespassers or would be otherwise unauthorized to be present, such as along right-of-ways. In more unique circumstances, deference should be given to state permitting agencies' authority to determine the areas necessary to include in the ambient air analysis to determine whether a particular project will cause or contribute to a modeled NAAQS or increment exceedance within their regulatory programs.

### **Unrealistic Modeling Assumptions**

EPA's modeling guidelines have historically required excessively conservative assumptions about dispersion model inputs that frequently result in gross overestimates of a project's air quality impacts. Combined with increasingly more stringent NAAQS, this situation presents state regulatory agencies and the regulated community with complex challenges that are barriers to efficient air permitting and stifle economic growth. While EPA has acknowledged how some of its policies overstate true impacts as in the 2017 Appendix W changes, many more changes are needed.

Long-standing EPA policies for NSR implementation restrict a state agency's ability to embrace the use of approaches that address the variability of source emission rates, or that allow for the exclusion of intermittently-operated sources in certain circumstances. In addition, EPA is slow to develop and adopt new dispersion modeling tools that are superior to existing approaches for low wind conditions, building downwash, complex terrain, intermittent/variable sources, and other

challenges. Modeling techniques and implementation guidance have frequently not been available at the time new air quality standards and regulatory requirements become effective.

Although the revised 2017 Appendix W requires facilities to address ambient impacts from projects with significant increases in emissions of ozone or PM<sub>2.5</sub> precursors, EPA has not fully developed adequate tools, screening techniques, and implementation guidance that are needed in order to develop a robust analysis that avoids the time and expense of single source photochemical modeling.

Finally, data-driven probabilistic methods have been embraced in other EPA programs and are equally applicable to air quality compliance demonstrations when simulating variable emission rates and representative background concentrations. State agencies can be a laboratory for innovation but they are reluctant to adopt new approaches given EPA's history of second guessing decisions.

There are several policy changes EPA could embrace to solve these modeling conundrums. First, EPA should more fully develop and finalize tools such as Significant Impact Levels (SILs) that facilities can use to perform screening level analyses and avoid the time and expense of single source photochemical modeling for projects with significant emissions increases of ozone and PM<sub>2.5</sub> precursors. The modeling thresholds should be set at a sufficiently high level to exclude projects with minimal impacts.

Second, EPA should continue to incorporate data-driven, probabilistic methods into air quality analyses that simulate emission variability and representative source conditions. For example, EPA's recent revision to Appendix W for cumulative impact analyses emphasizes the use of *representative* actual emissions for non-modified emission units rather than assuming that all sources continuously and simultaneously emit at the maximum allowable short-term emission rate. EPA should expand that approach to use probabilistic modeling techniques such as EMVAP or "randomly reassigned emissions" to formulate realistic emissions inputs that conservatively account for emissions variability of new or modified sources. Implementation of these concepts into air quality compliance demonstrations for permitting can be done through changes in guidance or a revision/clarification to Appendix W.

Third, EPA should make improved dispersion modeling tools a higher priority for model development and evaluation/determination of acceptability of new models. New modeling techniques should be evaluated based on their overall performance

and the soundness of the science, not be automatically rejected based on limited cases of under-prediction.

Fourth, EPA should revise its policy to implement new air quality standards for permitting immediately upon the effective date to avoid recurring situations when modeling tools, data, and implementation guidance are not yet available.

Finally, permitting decisions made by state agencies that are based on reasonable data and sound analytical techniques should be respected without being second guessed by EPA.

### **Real-World Examples of Problems with NSR and PSD Program**

Many industries and our own have been concerned about the NSR and PSD programs for many years. While some changes have occurred recently, the pace of change has been slow and limited. Full modernization of the air permitting program would create greater certainty to invest in American manufacturing facilities. Here are several examples of projects that would benefit from the reforms previously suggested.

#### **1. Thermal Oil Heater Energy Reduction Project**

In order to reduce energy consumption, particulate emissions, and volatile organic compounds (VOC) emissions and comply with the Boiler MACT requirements, a wood products mill proposed to route the exhaust from four thermal oil heaters into dryer burners as combustion air. The emissions from the existing thermal oil heaters were going to older style, electrified filter beds that achieved 70% particulate removal and spare parts were no longer available.

Because the heater exhaust is hotter than the incoming air used for combustion in the dryer burners, the company would burn less wood to get the same amount of heat to dry the flakes. In addition, the heater exhaust would be combined with the OSB dryer exhaust and be cleaned by a modern wet electrostatic precipitator (WESP) for particulate control and then a go through a regenerative thermal oxidizer (RTO) for VOC/HAP control. The WESP is approximately 98% efficient in removing particulate and the RTO destroys approximately 95% of the VOCs/HAPs. Additional particulate removal was estimated to be at least 20 tons per year with no changes in the other criteria pollutants.

The state claimed that since the facility had previously gone through the PSD permitting process for the heaters and the dryers *separately* and that BACT levels were established for each and that since a change was being made to where the

heater exhaust was routed, BACT had not been established for the heater exhaust going into the dryers. Consequently, EPA required the facility to go through PSD again and reestablish BACT -- regardless of whether there was a significant increase in emissions.

In addition, the state agency required the facility to aggregate in the PSD evaluation two unrelated dryer RTO replacement projects even though they had previously exempted the projects as "like kind replacements." The RTOs were old and in jeopardy of catastrophic failure. The company provided the information required in the "3M Maplewood" guidance showing the RTO replacements were not related to the heater project, but the state disagreed.

In the end, the company decided to go through the burdensome PSD analysis and aggregate the RTO projects with the heater energy efficiency project because of the looming Boiler MACT compliance deadlines and winter weather that would limit construction. The project was delayed approximately 5 months and the company spent an additional \$100K on assessment of alternative compliance options plus \$59K for state permitting fees. The delay resulted in an *increase* of 10 tons of particulate emissions and no substantive changes to the project's scope as a result of the exhaustive (and unnecessary) review. If EPA adjusted both its aggregation policy and how to account for decreases in emissions, the state could have allowed the project to proceed quickly, and the company and environment would have been better off.

## **2. Paper Mill – Paper Machine Restart**

In response to an emerging market demand for a specific type and quality paper, the mill proposed to restart a paper machine that had previously been taken out of service. An air permit was required since the project involved extensive repairs and various equipment modifications in order to return the machine to working order. Global market conditions combined to create a very narrow time window that had to be met to ensure acceptable financial return and justify the capital investment. To meet the window of opportunity, the mill needed to obtain a permit, complete repairs and modifications and be up and running within 7 months. Since a major NSR permit would require 12-16 months to obtain, emission increases from the project had to be kept below major significance levels and qualify for a minor NSR permit. To constrain emission increases, the scope of the physical and operational changes had to remain very narrow, and production increases had to come solely from recycled fiber in order to demonstrate that virgin pulping processes and chemical recovery operations would not be "debottlenecked" (with possible emissions increase implications) or otherwise affected by the project.

While this project was successfully permitted and implemented, the company was only able to capture a portion of the financial benefits of the global market expansion. The time needed to obtain a major NSR permit prevented the company from pursuing more substantive modifications that would allow larger increases in production and possibly position the mill to capture a greater share of the expanding market. Expectations to account for emissions from unmodified, but otherwise affected process operations (i.e., “debottlenecking”) caused the company to accept new operating constraints that prevents full utilization of existing assets and restricts flexibility to be able to respond to future market opportunities. Finally, this project sets the stage for “project aggregation” discussions that will need to be evaluated and addressed in the future when the mill attempts to get a permit involving virgin pulping or chemical recovery operations, including projects focused on cost, reliability or energy related improvements.

If EPA can reduce the significant time needed to get a permit, then market opportunities like this can be realized -- especially if better emissions accounting procedures are adopted. And if EPA’s aggregation policy is fixed so only truly linked projects are added together, then long-term operating flexibility would not be sacrificed to obtain a near-term opportunity.

### **3. Mill Infrastructure Project**

A paper mill wanted to improve mill operations by shutting down two older, inefficient smaller boilers and upgrading a newer, larger boiler to meet the same steam needs for operations. The changes would use less overall energy and not increase emissions. Rather than being able to undertake the project quickly, the company was forced by EPA through a lengthy review process, wasting several months and requiring additional consulting expenses. In the words of the company, this was “an absurd result.”

Specially, EPA -- over the objections of the state -- did not allow the mill to count reductions in emissions at the same time as the “increases” from the upgraded boiler -- which otherwise would have made the project not “significant” and would have avoided PSD review. In addition, the regulators wanted the company to look at two previous unrelated improvements to the older boilers using the “actual to projected to emit” emissions test, summed with the current change. That essentially would have suggested that emissions were increasing at the units as a result of their permanent shutdown; which is illogical.

Compared to new pre-project baseline actual emissions (BAE), the analyses projected an increase above the significance level for the pollutant. However, if only contemporaneous changes were considered, even a conservative “actual to potential to emit” test would have shown no increase and thus a minor NSR project.

Fortunately, the company and state pressed EPA to allow the netting of the actual decreases to offset the “increase” from the modified boiler under the current project, showing zero additional air emissions. The process took 18 months from beginning to end, with some time spent by the company changing the scope. EPA should change its policies and regulations to allow realistic emission accounting procedures for projects and limit considerations to contemporaneous changes to avoid these unnecessary delays, expenses, and uncertainties that hinder investments and competitiveness while not benefiting, or even harming, the environment.

#### **4. Paper Mill – Paper Machine Conversion**

The mill proposed to convert an existing paper machine from producing free sheet using bleached virgin pulp stock to producing new products that involve unbleached pulp stock. The conversion required physical modifications to the machine in addition to the installation of new ancillary equipment. The primary emissions source was the paper machine which involved negligible sources of emissions. Prior to commencing construction, the mill is required to receive authorization from the regulatory agency in the form of a construction permit. In this instance, the long lead time for constructing the new equipment necessitated the need to receive construction authorization within a few months which was not possible under the current permitting system. As a fallback, the company chose to minimize the emission impact of the affected units by committing that virgin pulp production would remain at historic levels.

This example illustrates the need to streamline the current NAAQS modeling process, which involves submittal of a dispersion modeling protocol and approval of the protocol prior to the submittal of a construction permit application even for units that are not being modified and have been previously evaluated for environmental impacts. These extra steps in the process are one part of what makes triggering major NSR permitting more time consuming than certain projects can tolerate.

In addition, the primary driver for the timing of this project is the construction lead time of emissions units with negligible emissions rates. Allowing for construction of

minor emissions sources that do not trigger NSR permitting obligations (prior to the PSD triggering modifications being approved (i.e., phased permitting)) would pave the way for a more flexible permit that still meets environmental requirements.

Finally, ambiguity in EPA's aggregation policy creates business planning uncertainty. A minor project such as this conversion might be "aggregated" with a future unrelated project such as one to improve pulp yields driven by market conditions. This puts mills in the position of second guessing themselves about the future emissions implications of decisions made today even when projects are unrelated. Finalization of the aggregation rulemaking is critical to creating a rationale permitting process where only truly linked projects are considered together.

## **5. Paper Mill – Paper Machine Project**

The company wants to replace three existing paper machines with one new, more efficient machine. The emissions inventory and PSD applicability analysis for the project has been unnecessarily complicated given current NSR regulations and guidance. The company has spent several months on the emission analysis, when it should have only taken weeks if emissions assessments were limited to equipment being modified rather than other processes.

In addition, the company cannot account for the decrease in emissions from shutting down the existing paper machines or from limiting operation of one of the power boilers in "Step 1" of the emission analysis; only emission increases, not decreases, may be counted in Step 1. A proper accounting of the project's net emission impact should include the emission decreases associated with a project.

"Step 2" of the emissions analysis requires that the emission increases associated with contemporaneous projects be calculated using the baseline actual to potential to emit (PTE) method, even when the contemporaneous projects were evaluated using the actual-to-projected actual method, and actual emissions have not exceeded the projections. Instead, the netting analysis should include the actual emission increases from the contemporaneous projects or the actual-to-actual emission projections from the emission analysis conducted for those projects.

In the end, the project requires a federally enforceable emission limit to restrict operation of an existing power boiler. And as a result, the company cannot begin partial construction due to the need for this federally enforceable limit, delaying the start of the project. If the project had been appropriately classified as "minor"

construction would have commenced.<sup>10</sup>

In sum, waiting to begin construction of the project while a permit application is under review adds many months to the project's completion and delays the cost savings.

### **Other Permitting Improvements**

While EPA has the clear authority under the Clean Air Act to make substantial improvements to the NSR and PSD programs, strategic changes to the statute are needed in areas where the courts have limited EPA's attempts to improve the permitting program. Here are two opportunities for Congress.

### **Clean Unit Exemption**

As part of the New Source Reform provisions promulgated by EPA in December 2002, EPA included a new permitting applicability test for Clean Units. This provision allowed any emission unit that had been through a permitting process that resulted in Best Available Control Technology (BACT) or Lowest Achievable Emission Rate (LAER) emission control levels (or the state equivalent) being imposed would trigger NSR only if the facility was seeking an increase in its permitted allowable emissions. At the time of its promulgation, EPA stated that this exclusion "...protects air quality, creates incentives for sources to install state-of-the-art controls, provides flexibility for sources, and promotes administrative efficiency".<sup>11</sup>

However, the Clean Unit exemption was vacated by the DC Circuit Court of Appeals in June, 2005<sup>12</sup>. The Court found that the exclusion was contrary to the Clean Air Act because it exempts certain emission units from NSR permitting on the basis of their status, rather than on the basis of changes in their actual emissions.

Nonetheless, the Clean Unit concept represents an important development for the regulated community, because when an existing facility that operates such state-

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<sup>10</sup> In addition, the NSR regulations should allow a facility to start, completely at its own risk, construction of a source or project prior to obtaining an NSR permit. Companies would find the risk of constructing an entire source too great since the permit could be denied or costly retrofits required. However, most companies would undertake currently prohibited construction activities to start a project and accelerate project benefits that could be realized.

<sup>11</sup> 67 Federal Register 80190 "Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR); Final Rule and Proposed Rule. December 31, 2002.

<sup>12</sup> New York v. EPA, 413 F. 3d 3, DC Circuit, June 24, 2005.

of-the-art emission control systems triggers new source review, the permitting process invariably results in minimal (if any) improvements to either existing air quality or the efficiency of the emission control systems installed on the source. A legislative change to the Clean Air Act authorizing the 2002 Clean Unit exclusion would be helpful.

### **Pollution Control Projects**

The 2002 New Source Reform provisions exempted specific Pollution Control Projects (PCPs) from having to undergo preconstruction NSR permitting in specific situations where installation of controls targeting reduction of a specific type or family of pollutants causes a collateral and significant emission increase of an NSR regulated pollutant. The rule defined a PCP as "...any activity, set of work practices or project undertaken at an existing emissions unit that reduces emissions of air pollutants from the unit." EPA stated that one of the purposes of promulgating this PCP exemption was to remove any disincentive for industrial sources to undertake pollution control and prevention measures.

The General Provisions to EPA's New Source Performance Standards (NSPS) program specifically allows pollution control projects to be exempted from the definition of a "modification" to an existing source that might otherwise trigger the need for the source to meet new source emission standards. As the NSR and NSPS programs both utilize a fundamentally similar definition for modification, it is inappropriate for EPA to allow pollution control projects to be considered exempt for NSPS purposes yet at the same time trigger preconstruction review under the NSR program.

The PCP exemption included in the 2002 NSR Reform provisions was intended to codify in the NSR rules a very similar exclusion that EPA had made available by interpretive policy in 1994.<sup>13</sup> The interpretive policy was in turn based on the explicit PCP exclusion afforded by EPA to electric utility units in 1992 (i.e., the "WEPCO rule"). The 2002 NSR Reform rule made the PCP exemption available to all source categories but at the same time contained safeguards that were intended to ensure that such projects would, on balance, be environmentally beneficial and would achieve the goals of minimizing regulatory burdens and reduce procedural delays for such projects.

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<sup>13</sup> "Pollution Control Projects and New Source Review (NSR) Applicability", John. S. Seitz, Director, EPA OAQPS, July 1, 1994.

The PCP exclusion was vacated by the DC Circuit of Appeals in 2005, along with the Clean Unit Exclusion. At that time, the Court reasoned that EPA lacked the authority to create blanket PCP exemptions from NSR, essentially because EPA was unable to demonstrate to the Court's satisfaction that Congress originally intended pollution control projects to be exempted from preconstruction review when the Clean Air Act was implemented.

The vacatur of the PCP exclusion discourages prompt implementation of projects whose primary purpose is either the reduction of air emissions or pollution prevention. It also creates an absurd situation for sources that are required to install emission controls in order to comply with other parts of the CAA, such as Maximum Achievable Control Technology (MACT) standards under Title III. Operation of the MACT control causes collateral increase in criteria pollutant emissions regulated under Title I and subject to preconstruction NSR permit requirements. As the regulations are currently configured, such collateral increases are required to be compared against PSD significant emission rates to determine whether the installation of the mandated emission controls constitutes a major modification subject to PSD review. This catch-22 is both counter-productive and burdensome to the regulated community. Given the court decision, a change to the Clean Air Act seems the best way to exclude pollution control projects from NSR.

## **Conclusion**

In enacting the Clean Air Act, I do not believe that Congress intended to create such an arcane NSR permitting system using unrealistic assumptions and modeling to impede permits as manufacturers strive to grow and innovate. In fact, in response to the Department of Commerce and EPA outreach last year on impediments to U.S. manufacturing, many industries beyond forest products -- such as aerospace, mining, steel, and utilities -- highlighted NSR as ripe for reform. AF&PA and AWC urge this committee to work with EPA to improve the NSR and PSD programs so minor projects are excluded and those with significant emissions increases can use realistic assumptions and the best science in their air quality assessments.

To further the twin purposes of the Clean Air Act, our goal should be sustainable regulation -- regulation that addresses environmental and economic needs. I believe there is no better place for a robust manufacturing sector than the United States, which has highly productive workers, creative entrepreneurs and innovators, abundant resources, a strong free-market democracy, and regulatory agencies capable of leading the world on sustainable regulation.



E. SCOTT PRUITT  
ADMINISTRATOR

December 7, 2017

**MEMORANDUM**

**SUBJECT:** New Source Review Preconstruction Permitting Requirements: Enforceability and Use of the Actual-to-Projected-Actual Applicability Test in Determining Major Modification Applicability

**FROM:** E. Scott Pruitt

**TO:** Regional Administrators

**I. Introduction and Purpose of Memorandum**

In accordance with presidential priorities for streamlining regulatory permitting requirements for manufacturing and other types of facilities, the U.S. Environmental Protection Agency is conducting a review of the agency's implementation of the preconstruction permitting requirements under the Clean Air Act, which are generally known as the New Source Review program. This review will involve an assessment of opportunities for the EPA to make improvements by clarifying or revising the EPA regulations implementing the NSR program, providing technical support and oversight to the states that administer the program and evaluating the agency's enforcement of the NSR requirements. With respect to the latter, there continue to be disputes pending in the United States courts in NSR enforcement cases that began before the EPA initiated the current review of the NSR program. The United States is represented in those matters by the Department of Justice and the Office of Solicitor General. As those cases proceed toward resolution, the EPA continues to have implementation and oversight responsibilities for the NSR program.

Based on an initial assessment, I understand that two recent appellate court decisions<sup>1</sup> in the pending enforcement proceeding against DTE Energy have created uncertainty regarding the applicability of NSR permitting requirements in circumstances where the owner or operator of an existing major stationary source projects that proposed construction will not cause an increase in actual emissions that triggers NSR requirements. As we begin the EPA's current review of the

<sup>1</sup> These appellate decisions are *U.S. v. DTE Energy Co.*, 711 F.3d 643 (6th Cir. 2013) and *U.S. v. DTE Energy Co.*, 845 F.3d 735 (6th Cir. 2017).

NSR program, this memorandum communicates how the EPA intends to apply and enforce certain aspects of the applicability provisions of the NSR regulations that have been addressed in these appellate decisions.

In particular, this memorandum addresses the EPA's intended approach concerning the procedures contained in the NSR Reform Rules<sup>2</sup> (and approved state regulations that reflect the content of those rules) for sources that have used or intend to use "projected actual emissions" in determining NSR applicability and the associated pre- and post-project source obligations. While this memorandum describes our current intended approach for future matters, decisions about how to proceed in ongoing enforcement matters will be made on a case-by-case basis. We believe this memorandum is necessary to provide greater clarity for sources and states implementing the NSR regulations. The guidance is also generally consistent with the NSR Reform Rules and with EPA objectives and ongoing efforts to clarify and streamline the NSR program requirements and reduce burden on regulated sources in accordance with recent Presidential actions.<sup>3</sup>

The remainder of this memorandum is organized into two sections. Section II contains relevant CAA, regulatory and litigation background. Section III contains a discussion of the issues raised by the DTE litigation and addresses the EPA's current intended approach concerning the following specific topics: 1) consideration of post-project emissions management in determining NSR applicability; 2) the role of post-project actual emissions in major modification applicability; 3) the EPA oversight and enforcement of pre-project NSR applicability analyses involving the actual-to-projected-actual applicability test; and 4) the role of EPA-approved state and local NSR programs in implementing NSR requirements.

This memorandum explains how the EPA intends to apply and enforce certain requirements of the NSR regulations as we begin review of that program. This document is not a rule or regulation, and the guidance it contains may not apply to a particular situation based upon the individual facts and circumstances. This memorandum does not change or substitute for any law, regulation or other legally binding requirement and is not legally enforceable. This memorandum is not final agency action, but merely clarifies the EPA's current understanding regarding certain elements of the NSR regulations.

## **II. Background on CAA and Regulatory Provisions and DTE Litigation**

### *A. Relevant CAA and EPA Regulatory Provisions*

The NSR provisions of the CAA and of the EPA's implementing regulations require new major stationary sources and major modifications at existing major stationary sources to, among other things, obtain an air quality permit before beginning construction. This permitting process for major stationary sources is required whether the major source or major modification is planned for an area where the national ambient air quality standards (NAAQS) are exceeded

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<sup>2</sup> In 2002, the EPA issued a final rule that revised the regulations governing the major NSR program. 67 FR 80186. We refer generally to these rule provisions as "NSR Reform."

<sup>3</sup> See e.g., Presidential Memorandum: Streamlining Permitting and Reducing Regulatory Burdens for Domestic Manufacturing (January 24, 2017); Executive Order 13777: Enforcing the Regulatory Reform Agenda (February 24, 2017).

(nonattainment areas) or an area where the NAAQS have not been exceeded (attainment and unclassifiable areas). In general, permits for sources in attainment areas and for other pollutants regulated under the major source program are referred to as prevention of significant deterioration (PSD) permits, while permits for major sources emitting nonattainment pollutants and located in nonattainment areas are referred to as nonattainment NSR (NNSR) permits. The entire preconstruction permitting program, which includes the PSD and the NNSR permitting programs, is referred to as the NSR program.<sup>4</sup>

The CAA defines a "modification" as "any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted." 42 U.S.C. § 7411(a)(4). A "major modification" is defined in the regulations as "any physical change in or change in the method of operation of a major stationary source that would result in: a significant emissions increase (as defined in paragraph (b)(40) of this section) of a regulated NSR pollutant (as defined in paragraph (b)(50) of this section); and a significant net emissions increase of that pollutant from the major stationary source." 40 C.F.R. § 52.21(b)(2)(i).

The NSR applicability procedures in the regulations reaffirm the role of the "project" emissions increase<sup>5</sup> and "net emissions increase"<sup>6</sup> in determining major modification applicability: "...a project is a major modification for a regulated NSR pollutant if it causes two types of emissions increases – a significant emissions increase (as defined in paragraph (b)(40) of this section), and a significant net emissions increase (as defined in paragraphs (b)(3) and (b)(23) of this section). The project is not a major modification if it does not cause a significant emissions increase. If the project causes a significant emissions increase, then the project is a major modification only if it also results in a significant net emissions increase." 40 C.F.R. § 52.21(a)(2)(iv)(a).

Prior to beginning construction of a project the owner or operator of the major stationary source must calculate the emissions increases that it projects will be caused by the project and potentially the net emissions increase to determine if NSR permitting is required. The procedure for calculating whether a significant emissions increase will occur as a result of a modification is emission unit specific and depends upon whether the emissions unit is new or existing. For new emissions units, increases are calculated using the "actual-to-potential" test, and for existing emissions units, increases are calculated using the "actual-to-projected-actual" applicability test.

<sup>4</sup> The CAA requirements for PSD programs set forth under at 42 U.S.C. §§ 7470-7479 are implemented by the EPA's PSD regulations found at 40 C.F.R. § 51.166 (minimum requirements for an approvable PSD State Implementation Plan) and 40 C.F.R. § 52.21 (PSD permitting program for permits issued under the EPA's federal permitting authority). The CAA sets forth requirements for state implementation plans for nonattainment areas at 42 U.S.C. §§ 7501-7515, and the general provisions include NNSR permitting requirements at 42 U.S.C. §§ 7502(c)(5) and 7503. The CAA's NNSR permitting requirements are implemented by the EPA's NNSR regulations found at 40 C.F.R. § 51.165, § 52.24 and part 51 of Appendix S. This memorandum cites certain definitions and requirements in the federal PSD regulations at 40 C.F.R. § 52.21. However, the other NSR regulations identified contain analogous definitions and requirements, and the statements in this memorandum also apply to those analogous provisions.

<sup>5</sup> A "project" is defined as "a physical change in, or change in the method of operation of, an existing major stationary source." 40 C.F.R. § 52.21(b)(52).

<sup>6</sup> The net emissions increase is calculated as the sum of the project emissions increase, calculated pursuant to 40 C.F.R. § 52.21(a)(2)(iv), and any other increases and decreases in actual emissions at the major stationary source that are contemporaneous and otherwise creditable. See 40 C.F.R. § 52.21(b)(3).

See 40 C.F.R. § 52.21(a)(2)(iv). Under both applicability tests, pre-project actual emissions are established using "baseline actual emissions," which are defined specifically for existing electric utility steam generating units and separately for all other existing emissions units. See 40 C.F.R. § 52.21(b)(48). Under the actual-to-potential test, an emissions increase is calculated as the difference between the potential to emit (as defined at 40 C.F.R. § 52.21(b)(4)) following completion of the project and the baseline actual emissions. Under the actual-to-projected-actual applicability test, an emissions increase is calculated as the difference between the projected actual emissions (as defined at 40 C.F.R. § 52.21(b)(41)) and the baseline actual emissions.<sup>7</sup>

The focus of this memorandum is on the actual-to-projected-actual applicability test and associated requirements in the NSR regulations. "Projected actual emissions" is defined as "the maximum annual rate, in tons per year, at which an existing emissions unit is projected to emit a regulated NSR pollutant in any one of the 5 years following the date the unit resumes regular operation after the project, or in any one of the 10 years following that date, if the project involves increasing the emissions unit's design capacity or its potential to emit that regulated NSR pollutant and full utilization of the unit would result in a significant emissions increase or a significant net emissions increase at the major stationary source." 40 C.F.R. § 52.21(b)(41)(i). In making a projection, the owner or operator "[s]hall consider all relevant information, including but not limited to, historical operational data, the company's own representations, the company's expected business activity and the company's highest projections of business activity, the company's filings with the State or Federal regulatory authorities, and compliance plans under the approved State Implementation Plan." 40 C.F.R. § 52.21(b)(41)(ii)(a). In order to determine the projected increase that results from the particular change consistent with the definition of "major modification," the owner or operator "[s]hall exclude, in calculating any increase in emissions that results from the particular project, that portion of the unit's emissions following the project that an existing unit could have accommodated during the consecutive 24-month period used to establish the baseline actual emissions under paragraph (b)(48) of this section and that are also unrelated to the particular project, including any increased utilization due to product demand growth."<sup>8</sup> 40 C.F.R. § 52.21(b)(41)(ii)(c). Finally, the rules contain objective calculation requirements (e.g. for electric utility steam generating units, baseline actual emissions must be based on consecutive 24-month period in the 5-year period immediately preceding the project, and in order not to trigger NSR permitting requirements, the calculated emissions increase may not equal or exceed numerical "significance" thresholds). See 40 C.F.R. § 52.21(b)(23), (48).

With respect to the role of post-project actual emissions in the major modification applicability provisions, the regulations state the following: "Regardless of any such preconstruction projections, a major modification results if the project causes a significant emissions increase and a significant net emissions increase." 40 C.F.R. § 52.21(a)(2)(iv)(b). In addition, the regulations contain specific recordkeeping, monitoring and reporting provisions set forth at 40 C.F.R. § 52.21(r)(6) that apply in circumstances where there is a "reasonable

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<sup>7</sup> In lieu of using projected actual emissions, owners or operators may use potential to emit. See 40 C.F.R. § 52.21(b)(41)(ii)(d).

<sup>8</sup> This provision is sometimes referred to as the "demand growth exclusion," when used in the context of utilities or the "independent factors exclusion," when used in the context of other manufacturing operations, and qualifying emissions are sometimes referred to as "excludable emissions." There is no presumption that an emissions increase following that change was caused by the change, but rather, this is the analysis required under § 52.21(b)(41)(ii)(c).

possibility,” as that term is defined at 40 C.F.R. § 52.21(r)(6)(vi), that a project that is not projected to cause a significant emissions increase may nevertheless result in an actual significant emissions increase of a regulated NSR pollutant.<sup>9</sup> Depending on the reasonable possibility criteria applicable to a project and the type of emissions unit(s) involved, owners or operators must comply with one or more of the following requirements: 1) document and maintain a pre-project record of the NSR applicability information identified at 40 C.F.R. § 52.21(r)(6)(i); 2) for electric utility steam generating units only, submit the information set out in paragraph (r)(6)(i); 3) monitor and record emissions, on a calendar-year basis, for a period of five or 10 years after the unit resumes regular operations after the change (depending on whether there is an increase in the design capacity or potential to emit); 4) for electric utility steam generating units only, submit a report of annual emissions for each year that monitoring is required; and 5) for all other units, submit a report if annual emissions exceed the baseline actual emissions by a significant amount and if such emissions differ from the pre-construction projection. *See* 40 C.F.R. § 52.21(r)(6)(i) - (v). For projects subject to 5-year post-change emissions tracking, the EPA indicated in the NSR Reform rule preamble that it would “presume that any increases that occur after 5 years are not associated with the physical or operational changes.”<sup>10</sup>

### *B. DTE Litigation*

Since 2010, the EPA has been involved in an enforcement action and litigation concerning a construction project at the DTE Monroe, Michigan power plant. At issue in that litigation has been a dispute between the EPA and DTE on the relationship between the requirements in the regulations that govern pre-project NSR emission projections and the role of post-project emissions monitoring.

The DTE litigation has resulted in two separate decisions by the same panel of three judges on the U.S. Court of Appeals for the Sixth Circuit. Neither of these decisions were unanimous, and in the second decision, each judge wrote a separate opinion. In the first decision, two of the three judges agreed that the EPA could pursue enforcement based solely on a claim that the source had failed to properly project, in accordance with the regulations, future emissions, even though actual emissions from the source had not increased after the construction was completed and the source resumed operation. *See U.S. v. DTE Energy Co.*, 711 F.3d 643, 649-650, 652 (6th Cir. 2013). In allowing enforcement based solely on violations of EPA regulations governing future emission projections, the majority opinion cautioned against EPA “second guessing” a projection. The third judge dissented based on her view that there was no enforceable violation of the EPA’s projection regulations when there was no post-construction emissions increase. *See id.* at 652-53. After the case reached the Sixth Circuit for the second time, the two judges who had agreed in the first case (that the EPA could pursue enforcement based solely on an allegedly improper projection) were unable to agree on the extent to which the EPA could “second guess” such a projection. *United States v. DTE Energy Co.*, 845 F.3d 735 (6th Cir. 2017). One of these two judges concluded that DTE had satisfied the basic requirements for making projections and the other concluded DTE had not. *Compare id.* at 738-740 *with id.* at 751-55. The third judge (the same one who dissented in the first case) concluded that she was required to follow the majority holding in the first case that the EPA could pursue enforcement based solely on an improper projection and then sided with the

<sup>9</sup> These provisions are sometimes referred to as the “reasonable possibility” rule provisions.

<sup>10</sup> 67 FR 80197 (December 31, 2002).

judge who found DTE had not adequately justified its projection (while declining to support the parts of her colleague's opinion that could be read to expand the majority opinion in the first case). *See id.* at 742.

The matters at issue in the DTE litigation are complex, and the appellate court decisions have left ambiguity regarding the scope of the applicable regulations and what sources must do to comply. Further, the Supreme Court has been asked to review the second appellate court opinion. Considering this uncertainty, the EPA believes it would be helpful to explain to stakeholders how the EPA plans to proceed in implementing and exercising its authority under those regulations pending further review of these issues by the EPA.

### III. Discussion

As described previously, the NSR regulations require owners or operators to perform a pre-construction applicability analysis to determine whether a proposed project would result in a significant emissions increase and a significant net emissions increase, thus triggering the requirement to obtain an NSR permit. The regulations also specify the information used in that analysis that, when certain criteria in the "reasonable possibility" rule provisions are met, shall be documented, maintained and in certain cases submitted to the reviewing authority prior to beginning construction. *See* 40 C.F.R. §§ 52.21(a)(2), 52.21(r)(6)(i), (ii). If required, the pre-project record must contain: 1) a description of the project; 2) identification of the emissions unit(s) whose emissions of a regulated NSR pollutant could be affected by the project; and 3) a description of the applicability test used to determine that the project is not a major modification for any regulated NSR pollutant, including the baseline actual emissions, the projected actual emissions, the amount of emissions excluded under paragraph (b)(41)(ii)(c) and an explanation for why such amount was excluded and any netting calculations,<sup>11</sup> if applicable. *See* 40 C.F.R. § 52.21(r)(6)(i).

One issue that has arisen with respect to determining projected actual emissions resulting from a proposed project is whether it is permissible under the regulations for an owner or operator to factor into the projection an intent to actively manage future emissions from the project on an ongoing basis to prevent a significant emissions increase or a significant net emissions increase from occurring. The EPA notes that the rule language specifically provides that "all relevant information" shall be considered in making a projection. *See* 40 C.F.R. § 52.21(b)(41)(ii)(a). Pending further review of the issues described above by the EPA, the EPA intends to apply the NSR regulations in accordance with this language such that the intent of an owner or operator to manage emissions from a unit in that manner after a project is completed represents relevant information in the context of projecting future actual emissions from that unit that could be considered along with other relevant information in making an emissions projection, as provided in the NSR regulations.

In finalizing the 2002 NSR rule revisions, the EPA explained that owners or operators "will not be required to make the projected actual emissions projection through a permitting action" and

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<sup>11</sup> The term "netting" refers to determining the net emissions increase. The net emissions increase is calculated as the sum of the projected emissions increase, calculated pursuant to 40 C.F.R. § 52.21(a)(2)(iv), and any other increases and decreases in actual emissions at the major stationary source that are contemporaneous and otherwise creditable. *See* 40 C.F.R. § 52.21(b)(3).

that it "also believe[d] that it is not necessary to make ... future projections enforceable in order to adequately enforce the major NSR requirements. The Act provides ample authority to enforce the major NSR requirements if ... physical or operational change results in a significant net emissions increase at [a] major stationary source." 68 FR 80204 (December 31, 2002). Moreover, the regulations are clear that owners or operators need not obtain approval of their pre-project NSR applicability analyses from the reviewing authority before construction.<sup>12</sup>

As the EPA explained in 2002, a key objective of the projected actual emissions provisions was to avoid the need for permitting authority review of NSR applicability determinations prior to implementation of a project. The rules instruct the affected source to consider "all relevant information," (as defined in 40 C.F.R. §52.21(b)(41)(ii)) in making an applicability determination. They also include specific instructions as to when and how actual emissions projections must be documented and when post-project emissions monitoring and reporting is required. If an affected source complies with those requirements, it has satisfied the source obligations that are required under our NSR rules.

The NSR rules instruct the source to exclude from a projection those emissions that both could have been accommodated during the baseline period and that are unrelated to the project. Because increased emissions may be caused by multiple factors, the EPA has recognized that the source must exercise judgement to exclude increases for which the project is not the "predominant cause." 45 Fed. Reg. 32,327 (1992). The NSR rules provide no mechanism for agency review of procedurally compliant emission projections. To infer the existence of such a mechanism would be tantamount to inferring agency authority to require pre-approval of emissions projections. Such an outcome is inconsistent with the text of the EPA rules and with the agency's clearly stated intent in adopting those rules.

Consistent with these regulations, the EPA intends to focus on the fact that it is the obligation of source owners or operators to perform pre-project NSR applicability analyses and document and maintain records of such analyses as required by the regulations. It also intends to focus on the fact that the post-project monitoring, recordkeeping and reporting requirements provide a means to evaluate a source's pre-project conclusion that NSR does not apply and that the NSR applicability procedures make clear that post-project actual emissions can ultimately be used to determine major modification applicability. This is reflected in the following sentence: "Regardless of any such preconstruction projections, a major modification results if the project causes a significant emissions increase and a significant net emissions increase." 40 C.F.R. § 52.21(a)(2)(iv)(b). In addition, the post-project monitoring and recordkeeping requirements under the "reasonable possibility" rule provisions described previously further confirm the important role that actual post-project emissions data play in determining NSR applicability.

Based on the foregoing, and while further review of these issues by the EPA is pending, the EPA intends to implement and exercise its authority under the NSR provisions to clarify that

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<sup>12</sup> With respect to existing electric utility steam generating unit(s), for which submittal of the pre-project record is required before beginning actual construction, the regulations explicitly state: "Nothing in this paragraph ... shall be construed to require the owner or operator or such a unit to obtain any determination from the Administrator before beginning actual construction." 40 C.F.R. § 52.21(r)(6)(ii). For all other emissions unit categories, there is no requirement to submit the pre-project applicability record before construction.

when a source owner or operator performs a pre-project NSR applicability analysis in accordance with the calculation procedures in the regulations, and follows the applicable recordkeeping and notification requirements in the regulations, that owner or operator has met the pre-project source obligations of the regulations, unless there is clear error (e.g. the source applies the wrong significance threshold). The EPA does not intend to substitute its judgement for that of the owner or operator by "second guessing" the owner or operator's emissions projections.

Furthermore, when an owner or operator projects that a project will result in an emission increase or a net emissions increase less than the significant emissions rate in accordance with the NSR regulations, the EPA intends to focus on the level of actual emissions during the 5- or 10-year recordkeeping or reporting period after the project for purposes of determining whether to exercise its enforcement discretion and pursue an enforcement action. That is, the EPA does not presently intend to initiate enforcement in such future situations unless post-project actual emissions data indicate that a significant emissions increase or a significant net emissions increase did in fact occur. Although the majority in the first DTE opinion held that the EPA may pursue enforcement of its projection regulation where a source owner or operator has failed to perform a required pre-project applicability analysis or has failed to follow the objective calculation requirements of the regulations regardless of the level of post-project emissions, the court decision does not compel the EPA to pursue enforcement in such situations. The EPA has substantial discretion regarding prosecution of violations of the CAA and the first DTE opinion does not limit the EPA's discretion to consider whether prosecution of other sources is warranted in similar circumstances. Thus, pending further review of these issues by the courts and the EPA, the agency does not intend to pursue new enforcement cases in circumstances such as those presented in the DTE matter.

Finally, the EPA notes that while this memorandum refers to federal NSR regulations at 40 C.F.R. § 52.21, in states with EPA-approved NSR programs, the state and local regulations that the EPA has approved into the SIP are the governing federal law. To be approvable, the NSR requirements in a state plan must be at least as stringent as the federal rule requirements in 40 C.F.R. §§ 51.165 and 51.166 for NNSR and PSD programs, respectively, but may be more stringent at the state's discretion. The implementation of the NSR program is one example of cooperative federalism under the CAA under which the state regulations have primacy once they are approved by the EPA. However, if it is later determined that the NSR program approved into the SIP is deficient, the EPA has the authority under 42 U.S.C. § 7410(k)(5) to call for a state to revise its regulations. In the absence of such a SIP call, it is the EPA-approved state regulations that govern NSR applicability.

cc: Ryan Jackson  
Mandy Gunasekara

**To:** Timothy Cama[tcama@thehill.com]  
**Cc:** Wilcox, Jahan[wilcox.jahan@epa.gov]  
**Sent:** Fri 12/8/2017 8:28:09 PM  
**Subject:** RE: Flagging an EPA item for you ...

- He is recused from DTE matters, because of his former firm's involvement, and has complied with recusal requirements. As such, I have been the point person on DTE matters from OAR's perspective. I would also note that this memo has been in the works since well before Bill was confirmed – the first draft from our career/technical team dates back to early October (Bill was sworn in in November)

o Broadly speaking on NSR reform and forward looking policy decisions, Bill has been involved in those conversations.

- The ongoing case is a separate issue. I will note that the Solicitor General's latest memo on the pending case included a footnote alluding to a forthcoming policy statement from EPA. So while it is separate, the Court has been on notice of an administrative change to the policy issues at hand in DTE. When I can get my computer to work, I'll send you that memo (which you can also grab online).

**From:** Timothy Cama [mailto:tcama@thehill.com]  
**Sent:** Friday, December 8, 2017 3:23 PM  
**To:** Gunasekara, Mandy <Gunasekara.Mandy@epa.gov>  
**Cc:** Wilcox, Jahan <wilcox.jahan@epa.gov>  
**Subject:** Re: Flagging an EPA item for you ...

Two little things I forgot to ask:

- Was Wehrum involved in this? I mostly ask because his old firm represented DTE.
- Does this amount to changing EPA's position in the ongoing case, or is that a separate decision?

Thanks.

--

Timothy Cama, Staff writer

The Hill

(202) 695-6245

Secure: [timothy.cama@protonmail.com](mailto:timothy.cama@protonmail.com)

On Fri, Dec 8, 2017 at 2:11 PM, Gunasekara, Mandy <[Gunasekara.Mandy@epa.gov](mailto:Gunasekara.Mandy@epa.gov)> wrote:

Thanks, Jahan. Tim – I'll call you at 2:45.

**From:** Wilcox, Jahan

**Sent:** Friday, December 8, 2017 2:07 PM

**To:** Timothy Cama <[tcama@thehill.com](mailto:tcama@thehill.com)>; Gunasekara, Mandy <[Gunasekara.Mandy@epa.gov](mailto:Gunasekara.Mandy@epa.gov)>

**Subject:** RE: Flagging an EPA item for you ...

I am adding Mandy to this email. She is a policy expert who can talk and walk you through this. Please cite it as Background or Background from an EPA official.

**From:** Timothy Cama [<mailto:tcama@thehill.com>]

**Sent:** Friday, December 8, 2017 12:41 PM

**To:** Wilcox, Jahan <[wilcox.jahan@epa.gov](mailto:wilcox.jahan@epa.gov)>

**Subject:** Re: Flagging an EPA item for you ...

Alright, no problem. Thanks.

--

Timothy Cama, Staff writer

The Hill

(202) 695-6245

Secure: [timothy.cama@protonmail.com](mailto:timothy.cama@protonmail.com)

On Fri, Dec 8, 2017 at 12:18 PM, Wilcox, Jahan <[wilcox.jahan@epa.gov](mailto:wilcox.jahan@epa.gov)> wrote:

I just flagged it for Politico after calling you.

**From:** Timothy Cama [mailto:[tcama@thehill.com](mailto:tcama@thehill.com)]

**Sent:** Friday, December 8, 2017 12:17 PM

**To:** Wilcox, Jahan <[wilcox.jahan@epa.gov](mailto:wilcox.jahan@epa.gov)>

**Subject:** Re: Flagging an EPA item for you ...

Actually could you give me another hour or two to see if I'm interested/can translate it before sending it elsewhere? If it's not too late.

--

Timothy Cama, Staff writer

The Hill

[\(202\) 695-6245](tel:(202)695-6245)

Secure: [timothy.cama@protonmail.com](mailto:timothy.cama@protonmail.com)

On Thu, Dec 7, 2017 at 5:20 PM, Wilcox, Jahan <[wilcox.jahan@epa.gov](mailto:wilcox.jahan@epa.gov)> wrote:

FYI ... Wanted to make sure you got this memo and EPA statement.

**Draft Desk Statement**

**Dec. 7 DTE/NSR Memo**

To provide certainty to companies as facilities plan projects that may change or expand their operations, EPA administrator Scott Pruitt has issued a memo to the agency's 10 regional administrators clarifying the EPA's current understanding of certain elements of Clean Air Act's New Source Review (NSR) regulations and when they should apply to projects at facilities that may increase emissions.

NSR regulations require facilities to project, before beginning work, whether a construction project will cause a significant emissions increase. If the construction project results in a significant emissions increase and NSR applies, then the facility must take extra steps to control emissions before beginning work on the project. If a project does not result in a significant emissions increase - and does not trigger NSR - a facility must still provide notice of the project to either the EPA or the state designated regulator. As an accountability mechanism for the relied upon justifications that NSR does not apply, a facility must record and report actual emissions every year for either five or 10 years after a project is complete.

Specifically, the memo discusses issues raised by litigation and addresses EPA's current intended approach concerning 1) consideration of post-project emissions management in determining NSR applicability; 2) the role of post-project actual emissions in major modification applicability; 3) the EPA oversight and enforcement of pre-project NSR applicability analyses involving the actual-to-projected-actual applicability test; and 4) the role of EPA-approved state and local NSR programs in implementing NSR requirements.

The primary purpose of the memo is to clarify that so long as a company complies with the procedural requirements of a preconstruction analysis, then EPA will not second-guess that analysis.

Providing certainty and clarity on this issue is an important first step to encouraging investments across all industrial sectors to move forward with incorporating new technologies and improving operational efficiencies yielding both economic and environmental benefits.

The memo is not a final agency action and does not change or substitute for any law or regulation. Nor is it legally enforceable.

Depending upon individual facts and circumstances, it may not apply to a particular situation. More information: <https://www.epa.gov/nsr>

**To:** Ford, Hayley[ford.hayley@epa.gov]  
**Cc:** Ferguson, Lincoln[ferguson.lincoln@epa.gov]; Dravis, Samantha[dravis.samantha@epa.gov]  
**Subject:** NSR Memo  
NSR policy memo\_draft final\_2017 12 04.docx

**Mandy M. Gunasekara**

Principal Deputy Assistant Administrator

Office of Air and Radiation

US Environmental Protection Agency

**To:** Dominguez, Alexander[dominguez.alexander@epa.gov]  
**Sent:** Tue 3/13/2018 1:00:59 PM  
**Subject:** FW: FOR APPROVAL: DRAFT NSR Project Netting Press Release

**From:** Gunasekara, Mandy  
**Sent:** Tuesday, March 13, 2018 9:00 AM  
**To:** Block, Molly <block.molly@epa.gov>; Dominguez, Alexander <dominguez.alexander@epa.gov>; Harlow, David <harlow.david@epa.gov>; Wehrum, Bill <Wehrum.Bill@epa.gov>; Woods, Clint <woods.Clint@epa.gov>  
**Cc:** Bowman, Liz <Bowman.Liz@epa.gov>; Daniell, Kelsi <daniell.kelsi@epa.gov>; Beach, Christopher <beach.christopher@epa.gov>  
**Subject:** RE: FOR APPROVAL: DRAFT NSR Project Netting Press Release

I think this looks good

**Ex. 5 - Deliberative Process**

## Ex. 5 - Deliberative Process

**From:** Block, Molly  
**Sent:** Tuesday, March 13, 2018 7:17 AM  
**To:** Dominguez, Alexander <dominguez.alexander@epa.gov>; Harlow, David <harlow.david@epa.gov>; Wehrum, Bill <Wehrum.Bill@epa.gov>; Gunasekara, Mandy <Gunasekara.Mandy@epa.gov>; Woods, Clint <woods.clint@epa.gov>  
**Cc:** Bowman, Liz <Bowman.Liz@epa.gov>; Daniell, Kelsi <daniell.kelsi@epa.gov>; Beach, Christopher <beach.christopher@epa.gov>  
**Subject:** Re: FOR APPROVAL: DRAFT NSR Project Netting Press Release

Just a quick reminder to take a look at the release below. We'd love to get this approved before the signing this morning. Thanks!

Molly

Sent from my iPhone

On Mar 12, 2018, at 5:46 PM, Block, Molly <[block.molly@epa.gov](mailto:block.molly@epa.gov)> wrote:

Please take a look at the press release above/below on tomorrow's guidance. Please let me know if you have any edits or questions. Thanks!

## **Ex. 5 - Deliberative Process**

# **Ex. 5 - Deliberative Process**

<2018-3-13 DRAFT News Release re NSR Project Netting.docx>

**To:** Block, Molly[block.molly@epa.gov]; Dominguez, Alexander[dominguez.alexander@epa.gov]; Harlow, David[harlow.david@epa.gov]; Wehrum, Bill[Wehrum.Bill@epa.gov]; Woods, Clint[woods.Clint@epa.gov]  
**Cc:** Bowman, Liz[Bowman.Liz@epa.gov]; Daniell, Kelsi[daniell.kelsi@epa.gov]; Beach, Christopher[beach.christopher@epa.gov]  
**Sent:** Tue 3/13/2018 12:46:56 PM  
**Subject:** RE: FOR APPROVAL: DRAFT NSR Project Netting Press Release

I'm reviewing now – will

**From:** Block, Molly  
**Sent:** Tuesday, March 13, 2018 7:17 AM  
**To:** Dominguez, Alexander <dominguez.alexander@epa.gov>; Harlow, David <harlow.david@epa.gov>; Wehrum, Bill <Wehrum.Bill@epa.gov>; Gunasekara, Mandy <Gunasekara.Mandy@epa.gov>; Woods, Clint <woods.clint@epa.gov>  
**Cc:** Bowman, Liz <Bowman.Liz@epa.gov>; Daniell, Kelsi <daniell.kelsi@epa.gov>; Beach, Christopher <beach.christopher@epa.gov>  
**Subject:** Re: FOR APPROVAL: DRAFT NSR Project Netting Press Release

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## Ex. 5 - Deliberative Process

# **Ex. 5 - Deliberative Process**

<2018-3-13 DRAFT News Release re NSR Project Netting.docx>

**From:** Whiteman, Chad S. EOP/OMB

**Location:** Dial-In: Ex. 6 - Personal Privacy **Code:** Ex. 6 - Personal Privacy

**Importance:** Normal

**Subject:** CONFIRMED: EPA NSR Memo Discussion

**Start Date/Time:** Fri 3/9/2018 5:30:00 PM

**End Date/Time:** Fri 3/9/2018 6:30:00 PM

[FINAL Project Emissions Accounting Guidance Memorandum v5 - 3-8-18.docx](#)

[FINAL Project Emissions Accounting Guidance Memorandum v5 - 3-8-18 comments.docx](#)

;

Attached is (1) EPA's most recent passback from Thursday (3/8) and (2) the EOP redline response document from 3/8 with the word 'comments' at the end of the document name.

**To:** Woods, Clint[woods.Clint@epa.gov]; Harlow, David[harlow.david@epa.gov]; Wehrum, Bill[Wehrum.Bill@epa.gov]; Dominguez, Alexander[dominguez.alexander@epa.gov]  
**From:** Gunasekara, Mandy  
**Sent:** Mon 3/5/2018 8:20:58 PM  
**Subject:** PEA Comms  
[Project Netting Press Release DRAFT 2018 03 05.docx](#)  
[Project Netting Comms Plan DRAFT 2018 03 05 .docx](#)

Attached is the latest version of the press release and comms plan with suggested edits. Please review. On the comms plan, we should supplement the roll-out list of stakeholders. I shared this with Szabo as well.

Once you all are okay – Alex, can you send to OP, OPA, OCIR and OPEE?

Does tomorrow afternoon work for a roll-out time?

**Mandy M. Gunasekara**

Principal Deputy Assistant Administrator

Office of Air and Radiation

US Environmental Protection Agency

**To:** Szabo, Aaron L. EOP/CEQ[Aaron.L.Szabo@ceq.eop.gov]  
**From:** Gunasekara, Mandy  
**Sent:** Mon 3/5/2018 8:15:09 PM  
**Subject:** Press Release  
[Project Netting Press Release DRAFT 2018 03 05.docx](#)  
[Project Netting Comms Plan DRAFT 2018 03 05 .docx](#)

Attached is draft release and comms plan for NSR memo. I'll call in a bit to follow-up and get your read.

**Mandy M. Gunasekara**

Principal Deputy Assistant Administrator

Office of Air and Radiation

US Environmental Protection Agency

**To:** Ford, Hayley[ford.hayley@epa.gov]  
**Cc:** Wehrum, Bill[Wehrum.Bill@epa.gov]  
**From:** Gunasekara, Mandy  
**Sent:** Mon 3/5/2018 3:51:26 PM  
**Subject:** Re: NSR

We may be able to tack it into the conversation at noon

Sent from my iPhone

On Mar 5, 2018, at 10:49 AM, Ford, Hayley <[ford.hayley@epa.gov](mailto:ford.hayley@epa.gov)> wrote:

This morning Sam mentioned that he may need to be briefed on the "Project Netting" memo. Thoughts?

### **Hayley Ford**

Deputy White House Liaison and Personal Aide to the Administrator

Environmental Protection Agency

[ford.hayley@epa.gov](mailto:ford.hayley@epa.gov)

Phone: 202-564-2022

Cell: 202-306-1296

**From:** Dravis, Samantha  
**Sent:** Monday, March 5, 2018 10:48 AM  
**To:** Ford, Hayley <[ford.hayley@epa.gov](mailto:ford.hayley@epa.gov)>  
**Subject:** Re: NSR

"Project Netting" Memo

Sent from my iPad

On Mar 5, 2018, at 10:40 AM, Ford, Hayley <[ford.hayley@epa.gov](mailto:ford.hayley@epa.gov)> wrote:

Sam – What is the NSR item that you mentioned Bill should brief him on this week?

Thanks!

**Hayley Ford**

Deputy White House Liaison and Personal Aide to the Administrator

Environmental Protection Agency

[ford.hayley@epa.gov](mailto:ford.hayley@epa.gov)

Phone: 202-564-2022

Cell: 202-306-1296

**To:** Wehrum, Bill[Wehrum.Bill@epa.gov]; Harlow, David[harlow.david@epa.gov]  
**From:** Gunasekara, Mandy  
**Sent:** Sat 2/24/2018 10:40:41 PM  
**Subject:** Fwd: NSR Memo

## Ex. 5 - Deliberative Process

Sent from my iPhone

Begin forwarded message:

**From:** "Palmieri, Rosario A. EOP/OMB" <Ex. 6 - Personal Privacy>  
**Date:** February 23, 2018 at 7:54:30 PM EST  
**To:** "Gunasekara, Mandy" <Gunasekara.Mandy@epa.gov>, "Catanzaro, Michael J. EOP/WHO" <Ex. 6 - Personal Privacy> "Moran, John S. EOP/WHO" <Ex. 6 - Personal Privacy> "Szabo, Aaron L. EOP/CEQ"  
**Cc:** "Wehrum, Bill" <Wehrum.Bill@epa.gov>, "Harlow, David" <harlow.david@epa.gov>  
**Subject:** RE: NSR Memo

Mandy,

Thank you very much for this.

## Ex. 5 - Deliberative Process

## **Ex. 5 - Deliberative Process**

I look forward to our discussion on Monday.

Thank you,

Rosario

Rosario Palmieri

Senior Counselor to the Administrator

Office of Information and Regulatory Affairs | Office of Management and Budget

o: 202-456-3484 | m: 202-881-7791 | e: [rpalmieri@omb.eop.gov](mailto:rpalmieri@omb.eop.gov)

**From:** Gunasekara, Mandy [<mailto:Gunasekara.Mandy@epa.gov>]

**Sent:** Friday, February 23, 2018 4:53 PM

**To:** Catanzaro, Michael J. EOP/WHO [Ex. 6 - Personal Privacy]; Moran, John S. EOP/WHO [Ex. 6 - Personal Privacy]; Szabo, Aaron L. EOP/CEQ

[Ex. 6 - Personal Privacy], Palmieri, Rosario A. EOP/OMB

**Cc:** Wehrum, Bill <[Wehrum.Bill@epa.gov](mailto:Wehrum.Bill@epa.gov)>; Harlow, David <[harlow.david@epa.gov](mailto:harlow.david@epa.gov)>

**Subject:** NSR Memo

Hi All:

Attached is the latest and close to final draft of OAR's NSR Project Emissions Accounting (formerly known as "project netting") Memo. Please review and let us know of any concerns/feedback. We are working to get this out by Wednesday in order to comport with our once a month goal.

Our comms team is developing messaging and roll-out. I can send that your way once complete.

Best,

Mandy

**Mandy M. Gunasekara**

Principal Deputy Assistant Administrator

Office of Air and Radiation

US Environmental Protection Agency

**To:** Catanzaro, Michael J. EOP/WHC [Ex. 6 - Personal Privacy] Moran, John S.  
EOP/WHO [Ex. 6 - Personal Privacy] Szabo, Aaron L.  
**EOP/CEQ:** [Ex. 6 - Personal Privacy] Palmieri, Rosario A. EOP/OMB [Ex. 6 - Personal Privacy]  
**Cc:** Wehrum, Bill [Wehrum.Bill@epa.gov]; Harlow, David [harlow.david@epa.gov]  
**From:** Gunasekara, Mandy  
**Sent:** Fri 2/23/2018 9:52:43 PM  
**Subject:** NSR Memo  
Project Netting Guidance Memorandum DRAFT to WH 2018 02 23.docx

Hi All:

Attached is the latest and close to final draft of OAR's NSR Project Emissions Accounting (formerly known as "project netting") Memo. Please review and let us know of any concerns/feedback. We are working to get this out by Wednesday in order to comport with our once a month goal.

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**Mandy M. Gunasekara**

Principal Deputy Assistant Administrator

Office of Air and Radiation

US Environmental Protection Agency

**To:** Wehrum, Bill[Wehrum.Bill@epa.gov]; Harlow, David[harlow.david@epa.gov]  
**Cc:** Dominguez, Alexander[dominguez.alexander@epa.gov]; Schwab, Justin[schwab.justin@epa.gov]  
**From:** Gunasekara, Mandy  
**Sent:** Tue 12/5/2017 1:06:07 PM  
**Subject:** NSR Memo  
[NSR Memo Redacted Version 2017 12 04.pdf](#)

Hi Bill and David,

Attached is a memo pertinent to tomorrow's NSR discussion:

**Ex. 5 - Deliberative Process**

## **Ex. 5 - Deliberative Process**

Bill – I'll look to call you closer to 9 pm to download on RTBT.

Have a good night!

Mandy

**Mandy M. Gunasekara**

Principal Deputy Assistant Administrator

Office of Air and Radiation

US Environmental Protection Agency

**To:** Ferguson, Lincoln[ferguson.lincoln@epa.gov]  
**Cc:** Jackson, Ryan[jackson.ryan@epa.gov]  
**From:** Gunasekara, Mandy  
**Sent:** Tue 12/5/2017 12:24:09 AM  
**Subject:** NSR Memo  
[NSR policy memo draft 2017 12 2 edits.docx](#)

See attached for SP review.

**Mandy M. Gunasekara**

Principal Deputy Assistant Administrator

Office of Air and Radiation

US Environmental Protection Agency

**To:** Timothy Cama[tcama@thehill.com]  
**Cc:** Wilcox, Jahan[wilcox.jahan@epa.gov]  
**From:** Gunasekara, Mandy  
**Sent:** Fri 12/8/2017 9:02:12 PM  
**Subject:** Re: Flagging an EPA item for you ...

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--

Timothy Cama, Staff writer  
The Hill  
(202) 695-6245  
Secure: [timothy.cama@protonmail.com](mailto:timothy.cama@protonmail.com)

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**From:** Wilcox, Jahan  
**Sent:** Friday, December 8, 2017 2:07 PM

**To:** Timothy Cama <[tcama@thehill.com](mailto:tcama@thehill.com)>; Gunasekara, Mandy  
<[Gunasekara.Mandy@epa.gov](mailto:Gunasekara.Mandy@epa.gov)>  
**Subject:** RE: Flagging an EPA item for you ...

I am adding Mandy to this email. She is a policy expert who can talk and walk you through this. Please cite it as Background or Background from an EPA official.

**From:** Timothy Cama [<mailto:tcama@thehill.com>]  
**Sent:** Friday, December 8, 2017 12:41 PM  
**To:** Wilcox, Jahan <[wilcox.jahan@epa.gov](mailto:wilcox.jahan@epa.gov)>  
**Subject:** Re: Flagging an EPA item for you ...

Alright, no problem. Thanks.

--

Timothy Cama, Staff writer

The Hill

(202) 695-6245

Secure: [timothy.cama@protonmail.com](mailto:timothy.cama@protonmail.com)

On Fri, Dec 8, 2017 at 12:18 PM, Wilcox, Jahan <[wilcox.jahan@epa.gov](mailto:wilcox.jahan@epa.gov)> wrote:

I just flagged it for Politico after calling you.

**From:** Timothy Cama [<mailto:tcama@thehill.com>]  
**Sent:** Friday, December 8, 2017 12:17 PM  
**To:** Wilcox, Jahan <[wilcox.jahan@epa.gov](mailto:wilcox.jahan@epa.gov)>  
**Subject:** Re: Flagging an EPA item for you ...

Actually could you give me another hour or two to see if I'm interested/can translate it before sending it elsewhere? If it's not too late.

--

Timothy Cama, Staff writer

The Hill

(202) 695-6245

Secure: [timothy.cama@protonmail.com](mailto:timothy.cama@protonmail.com)

On Thu, Dec 7, 2017 at 5:20 PM, Wilcox, Jahan <[wilcox.jahan@epa.gov](mailto:wilcox.jahan@epa.gov)> wrote:

FYI ... Wanted to make sure you got this memo and EPA statement.

### **Draft Desk Statement**

#### **Dec. 7 DTE/NSR Memo**

To provide certainty to companies as facilities plan projects that may change or expand their operations, EPA administrator Scott Pruitt has issued a memo to the agency's 10 regional administrators clarifying the EPA's current understanding of certain elements of Clean Air Act's New Source Review (NSR) regulations and when they should apply to projects at facilities that may increase emissions.

NSR regulations require facilities to project, before beginning work, whether a construction project will cause a significant emissions increase. If the construction project results in a significant emissions increase and NSR applies, then the facility must take extra steps to control emissions before beginning work on the project. If a project does not result in a significant emissions increase - and does not trigger NSR - a facility must still provide notice of the project to either the EPA or the state designated regulator. As an accountability mechanism for the relied upon justifications that NSR does not apply, a facility must record and report actual emissions every year for

either five or 10 years after a project is complete.

Specifically, the memo discusses issues raised by litigation and addresses EPA's current intended approach concerning 1) consideration of post-project emissions management in determining NSR applicability; 2) the role of post-project actual emissions in major modification applicability; 3) the EPA oversight and enforcement of pre-project NSR applicability analyses involving the actual-to-projected-actual applicability test; and 4) the role of EPA-approved state and local NSR programs in implementing NSR requirements.

The primary purpose of the memo is to clarify that so long as a company complies with the procedural requirements of a preconstruction analysis, then EPA will not second-guess that analysis.

Providing certainty and clarity on this issue is an important first step to encouraging investments across all industrial sectors to move forward with incorporating new technologies and improving operational efficiencies yielding both economic and environmental benefits.

The memo is not a final agency action and does not change or substitute for any law or regulation. Nor is it legally enforceable.

Depending upon individual facts and circumstances, it may not apply to a particular situation. More information: <https://www.epa.gov/nsr>



**To:** Minoli, Kevin[Minoli.Kevin@epa.gov]; Schwab, Justin[schwab.justin@epa.gov]; Traylor, Patrick[traylor.patrick@epa.gov]; Bodine, Susan[bodine.susan@epa.gov]  
**From:** Gunasekara, Mandy  
**Sent:** Fri 10/27/2017 12:07:45 PM  
**Subject:** RE: Prep for DTE Meeting  
[Emissions Projection Rule Outline DRAFT.docx](#)  
[NSR policy memo draft 10-4-17PSLrev.docx](#)

Attached is the latest memo from OAR re: the issues involved in this case and the original outline.

**From:** Minoli, Kevin  
**Sent:** Thursday, October 26, 2017 11:30 PM  
**To:** Gunasekara, Mandy <Gunasekara.Mandy@epa.gov>; Schwab, Justin <Schwab.Justin@epa.gov>; Traylor, Patrick <traylor.patrick@epa.gov>; Bodine, Susan <bodine.susan@epa.gov>  
**Subject:** Prep for DTE Meeting

**Attorney Work Product & Privileged -- Do NOT Release Under FOIA**

Hi Everyone- I am not 100% sure we will all be able to meet ahead of the 10:00 meeting, so wanted to have at least a virtual pre-meet through email.

I spoke with Jeff Woods briefly after a meeting on an unrelated topic earlier today. He

## Ex. 5 - Deliberative Process

## **Ex. 5 - Deliberative Process**

I will check my emails in the morning but am unlikely to be able to meet in advance. If we want to meet at 9:40 and walk over together we could do some coordination then, and the three of you should obviously feel free to meet without me.

Thanks, Kevin

Kevin S. Minoli

Acting General Counsel

Office of General Counsel

US Environmental Protection Agency

Office Line: 202-564-8040

Direct Dial: 202-564-5551

**To:** Lewis, Josh[Lewis.Josh@epa.gov]  
**From:** Gunasekara, Mandy  
**Sent:** Tue 3/13/2018 2:07:13 PM  
**Subject:** PEA Memo  
Project Emissions Accounting Guidance Memorandum.FINAL 03-12-18\_557pm.docx

**Mandy M. Gunasekara**

Principal Deputy Assistant Administrator

Office of Air and Radiation

US Environmental Protection Agency

**To:** Dominguez, Alexander[dominguez.alexander@epa.gov]  
**From:** Gunasekara, Mandy  
**Sent:** Tue 3/13/2018 1:36:47 PM  
[Project Emissions Accounting Guidance Memorandum.FINAL 03-12-18 557pm.pdf](#)

**Mandy M. Gunasekara**

Principal Deputy Assistant Administrator

Office of Air and Radiation

US Environmental Protection Agency

**To:** DeLuca, Isabel[DeLuca.Isabel@epa.gov]; Millett, John[Millett.John@epa.gov]  
**Cc:** Lewis, Josh[Lewis.Josh@epa.gov]  
**From:** Gunasekara, Mandy  
**Sent:** Thur 3/8/2018 10:26:38 PM  
**Subject:** RE: NSR Press Release

Yes – ideally we could rollout 10 or 11 am (I know that is pushing it especially since we may not have final sign-off from OMB until 10 am tomorrow morning) with a fall back of 2 pm.

**From:** DeLuca, Isabel  
**Sent:** Thursday, March 8, 2018 5:25 PM  
**To:** Gunasekara, Mandy <Gunasekara.Mandy@epa.gov>; Millett, John <Millett.John@epa.gov>  
**Cc:** Lewis, Josh <Lewis.Josh@epa.gov>  
**Subject:** RE: NSR Press Release

Thanks, Mandy! About timing, would early afternoon work for the press release? If the memo is signed in the morning, that would give time to notify the RAs and post the memo online before the announcement.

**From:** Gunasekara, Mandy  
**Sent:** Thursday, March 08, 2018 5:21 PM  
**To:** DeLuca, Isabel <DeLuca.Isabel@epa.gov>; Millett, John <Millett.John@epa.gov>  
**Subject:** NSR Press Release

Attached is the latest iteration of the NSR PEA Memo Press Release. I just sent a copy to Liz.

**Mandy M. Gunasekara**

Principal Deputy Assistant Administrator

Office of Air and Radiation

US Environmental Protection Agency



**To:** Dominguez, Alexander[dominguez.alexander@epa.gov]  
**Cc:** Woods, Clint[woods.Clint@epa.gov]; Harlow, David[harlow.david@epa.gov]  
**From:** Gunasekara, Mandy  
**Sent:** Thur 3/8/2018 10:24:59 PM  
**Subject:** Comms  
[NSR PEA Memo COMMS Plan.docx](#)  
[Project Netting Press Release DRAFT 2018 03 08.docx](#)

Please share with OCIR, OPEE and OP (I just sent Sam and Britt a copy). Please take out the comment in the press release before sending around. Also convey that the press release is still DRAFT and may change. Plan is to get the memo signed tonight and roll it out 10 am (best case) or push to 2 pm if necessary. Hill heads-up should start early in the AM.

**Mandy M. Gunasekara**

Principal Deputy Assistant Administrator

Office of Air and Radiation

US Environmental Protection Agency

**To:** Dravis, Samantha[dravis.samantha@epa.gov]  
**Cc:** Bolen, Brittany[bolen.brittany@epa.gov]  
**From:** Gunasekara, Mandy  
**Sent:** Thur 3/8/2018 10:23:03 PM  
**Subject:** RE:  
[NSR PEA Memo COMMS Plan.docx](#)  
[Project Netting Press Release DRAFT 2018 03 08.docx](#)

See attached. I just sent latest iteration of the press release to Liz for her input.

-----Original Message-----

From: Dravis, Samantha  
Sent: Thursday, March 8, 2018 5:22 PM  
To: Gunasekara, Mandy <Gunasekara.Mandy@epa.gov>  
Cc: Bolen, Brittany <bolen.brittany@epa.gov>  
Subject:

Hey can you include us please on the press release and coms plan for the memo

Sent from my iPhone

**To:** Harlow, David[harlow.david@epa.gov]  
**From:** Gunasekara, Mandy  
**Sent:** Tue 2/27/2018 7:11:17 PM  
**Subject:** Fwd: NSR reform  
[image001.jpg](#)  
[ATT00001.htm](#)  
[image002.jpg](#)  
[ATT00002.htm](#)  
[image003.jpg](#)  
[ATT00003.htm](#)  
[image004.jpg](#)  
[ATT00004.htm](#)  
[image005.jpg](#)  
[ATT00005.htm](#)  
[image006.jpg](#)  
[ATT00006.htm](#)  
[Paul Noe's NSR Oral Statement House EC 2-14-18.pdf](#)  
[ATT00007.htm](#)  
[Paul Noe's NSR Testimony House E&C 2-14-18.pdf](#)  
[ATT00008.htm](#)

The attached is just FYI: Paul Noe testified at E&C and wanted to share with us his vision of priorities.

Sent from my iPhone

Begin forwarded message:

**From:** "Noe, Paul" <Paul\_Noe@afandpa.org>  
**Date:** February 27, 2018 at 2:04:23 PM EST  
**To:** "Mandy Gunasekara (Gunasekara.Mandy@Epa.gov)" <Gunasekara.Mandy@Epa.gov>  
**Subject:** NSR reform

Dear Mandy:

FYI, attached is my oral statement and more detailed written testimony from the recent NSR reform hearing before the House E&C Environment Subcommittee. We laid out support for specific reforms, such as realistic project emissions accounting and use of realistic, probabilistic air quality modeling approaches, and provided examples of why NSR reform is needed.

Best regards,

Paul

**Paul Noe**

Vice President for Public Policy

[Paul\\_Noe@afandpa.org](mailto:Paul_Noe@afandpa.org)

(202) 463-2777

AMERICAN FOREST & PAPER ASSOCIATION

1101 K Street, N.W., Suite 700

Washington, D.C. 20005

**To:** Noe, Paul[Paul\_Noel@afandpa.org]  
**From:** Gunasekara, Mandy  
**Sent:** Tue 2/27/2018 7:10:06 PM  
**Subject:** Re: NSR reform

Thanks, Paul. This is very helpful and timely.

Best,  
Mandy

Sent from my iPhone

On Feb 27, 2018, at 2:04 PM, Noe, Paul <Paul\_Noel@afandpa.org> wrote:

Dear Mandy:

FYI, attached is my oral statement and more detailed written testimony from the recent NSR reform hearing before the House E&C Environment Subcommittee. We laid out support for specific reforms, such as realistic project emissions accounting and use of realistic, probabilistic air quality modeling approaches, and provided examples of why NSR reform is needed.

Best regards,

Paul

**Paul Noe**

Vice President for Public Policy

[Paul\\_Noel@afandpa.org](mailto:Paul_Noel@afandpa.org)

(202) 463-2777

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Washington, D.C. 20005

<image001.jpg>

<image002.jpg> <image003.jpg><image004.jpg><image005.jpg><image006.jpg>

<Paul Noe's NSR Oral Statement House EC 2-14-18.pdf>

<Paul Noe's NSR Testimony House E&C 2-14-18.pdf>

**To:** Keller, Peter[keller.peter@epa.gov]  
**From:** Rao, Raj  
**Sent:** Tue 3/13/2018 4:23:12 PM  
**Subject:** FW: Revised 3/13 - Final PEA Memo has been entered into CMS  
Project Emissions Accounting Guidance Memorandum.FINAL 03-13-18.docx

Raj Rao, P.E.  
Group Leader, New Source Review Group,  
Air Quality Policy Division,  
Office of Air Quality Planning and Standards (MD-C504-03)  
US Environmental Protection Agency  
109 TW Alexander Drive  
Research Triangle Park, NC 27709  
919-541-5344  
919-541-5509 - Fax

Note: Positions or views expressed here do not represent official EPA policy. Interagency Deliberative and Confidential

-----Original Message-----

From: Long, Pam  
Sent: Tuesday, March 13, 2018 7:46 AM  
To: Wood, Anna <Wood.Anna@epa.gov>; Lewis, Josh <Lewis.Josh@epa.gov>; Santiago, Juan <Santiago.Juan@epa.gov>; Harlow, David <harlow.david@epa.gov>; Rao, Raj <Rao.Raj@epa.gov>; Cortelyou-Lee, Jan <Cortelyou-Lee.Jan@epa.gov>  
Subject: Revised 3/13 - Final PEA Memo has been entered into CMS  
Importance: High

Attached is a revised version (4/13) of the PEA memo. On page 4, we corrected an indentation problem of the 1st paragraph and double checked the usage of "the" in front of EPA throughout the memo for consistency.

The attached memo matches the version that is currently in CMS (OAR-18-000-5132) and we wanted to ensure everyone has this current version that matches the file in CMS.

Any questions, please do not hesitate to contact me.

-----Original Message-----

From: Long, Pam  
Sent: Monday, March 12, 2018 6:16 PM  
To: Wood, Anna <Wood.Anna@epa.gov>  
Cc: Lewis, Josh <Lewis.Josh@epa.gov>; Santiago, Juan <Santiago.Juan@epa.gov>; Harlow, David <harlow.david@epa.gov>; Rao, Raj <Rao.Raj@epa.gov>; Cortelyou-Lee, Jan <Cortelyou-Lee.Jan@epa.gov>  
Subject: Final PEA Memo has been entered into CMS

The CMS tracking # is OAR-18-000-5132.

I am attaching the version within CMS.

Let me know if you have any questions.

**To:** Long, Pam[Long.Pam@epa.gov]  
**Cc:** Wood, Anna[Wood.Anna@epa.gov]; Santiago, Juan[Santiago.Juan@epa.gov]; Keller, Peter[keller.peter@epa.gov]; Harlow, David[harlow.david@epa.gov]; Lewis, Josh[Lewis.Josh@epa.gov]; Harnett, Bill[Harnett.Bill@epa.gov]; South, Peter[South.Peter@epa.gov]  
**From:** Rao, Raj  
**Sent:** Mon 3/12/2018 8:04:55 PM  
**Subject:** Final PEA memo for CMS  
[Project Emissions Accounting Guidance Memorandum.FINAL 031218.docx](#)

Pam, attached is the final PEA memo that OAR has asked us to upload in to CMS for Administrator's signature tomorrow.

Thanks

Raj

Raj Rao, P.E.  
Group Leader, New Source Review Group,  
Air Quality Policy Division,  
Office of Air Quality Planning and Standards (MD-C504-03)  
US Environmental Protection Agency  
109 TW Alexander Drive  
Research Triangle Park, NC 27709  
919-541-5344  
919-541-5509 - Fax

Note: Positions or views expressed here do not represent official EPA policy.  
Interagency Deliberative and Confidential

**To:** Conroy, David[Conroy.Dave@epa.gov]; Filippelli, John[Filippelli.John@epa.gov]; Fernandez, Cristina[Fernandez.Cristina@epa.gov]; Banister, Beverly[Banister.Beverly@epa.gov]; Nam, Ed[nam.ed@epa.gov]; Stenger, Wren[stenger.wren@epa.gov]; Weber, Rebecca[Weber.Rebecca@epa.gov]; Morales, Monica[Morales.Monica@epa.gov]; Lakin, Matt[Lakin.Matthew@epa.gov]; Adams, Elizabeth[Adams.Elizabeth@epa.gov]; Hamlin, Tim[Hamlin.Tim@epa.gov]  
**Cc:** Rao, Raj[Rao.Raj@epa.gov]; Santiago, Juan[Santiago.Juan@epa.gov]; Keller, Peter[keller.peter@epa.gov]; Harnett, Bill[Harnett.Bill@epa.gov]  
**From:** Wood, Anna  
**Sent:** Tue 3/13/2018 8:48:51 PM  
**Subject:** Memo re: Project Emissions Accounting Under the New Source Review Preconstruction Permitting Program  
[NSR memo 03-13-2018.pdf](#)

Greetings ADDs—

I wanted to make you aware of a memo signed today by Administrator Pruitt as you may receive inquiries from your states.

Today's memorandum on "project emissions accounting" communicates EPA's interpretation of the existing New Source Review (NSR) regulations with respect to the accounting of emissions changes from a project under Step 1 of the NSR applicability process (i.e., the determination of whether a project will result in a significant emissions increase). EPA is interpreting the current NSR regulations to allow for emissions decreases as well as increases to be considered at Step 1 of the NSR applicability process. This interpretation is grounded in the principle that the plain language of the Clean Air Act indicates that Congress intended to apply NSR to changes that increase actual emissions and the language in the corresponding NSR regulations is consistent with that intent. EPA will no longer subscribe to prior statements and interpretations indicating that the existing NSR regulations preclude the accounting of emissions decreases under Step 1 of the applicability process. EPA is not at this time withdrawing the 2006 notice of proposed rulemaking on "project netting," but is considering whether a rule revision is desirable to provide additional clarity on project emissions accounting.

I hope you will find this information useful, if you have any questions, please let me know.  
Thanks, Anna

Anna Marie Wood

Director, Air Quality Policy Division

OAQPS, U.S. EPA

109 T.W. Alexander Drive

Research Triangle Park, NC 27711

(919) 541-3604



E. SCOTT PRUITT  
ADMINISTRATOR

March 13, 2018

**MEMORANDUM**

**SUBJECT:** Project Emissions Accounting Under the New Source Review Preconstruction Permitting Program

**FROM:** E. Scott Pruitt

**TO:** Regional Administrators

In accordance with presidential priorities for streamlining regulatory permitting requirements for manufacturing, and in line with my prior recognition that “opportunities exist to simplify” the New Source Review process and thereby “achieve meaningful NSR reform,”<sup>1</sup> the U.S. Environmental Protection Agency has been undertaking an assessment of the agency’s implementation of the preconstruction permitting requirements under the NSR provisions of the Clean Air Act. As part of this assessment, the EPA has identified certain elements of the NSR regulations and associated EPA policies that have been sources of confusion and uncertainty.<sup>2</sup>

One such element that has given rise to uncertainty among both permitting authorities and stakeholders alike is whether emissions decreases from a proposed project at an existing major stationary source may be taken into account under Step 1 of the major modification applicability process in the EPA NSR regulations. The purpose of this memorandum is to communicate the EPA’s interpretation that its current NSR regulations provide that emissions decreases as well as increases are to be considered at Step 1 of the NSR applicability process, provided they are part of a single project. The EPA has at times indicated that the relevant provisions of the NSR regulations preclude the consideration of emissions decreases at Step 1, but for the reasons discussed below, the agency will no longer apply any such interpretation reflected in prior statements on this issue.<sup>3</sup>

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<sup>1</sup> See Final Report on Review of Agency Actions that Potentially Burden the Safe, Efficient Development of Domestic Energy Resources Under Executive Order 13783 (Oct. 25, 2017) at 3.

<sup>2</sup> See, e.g., “New Source Review Preconstruction Permitting Requirements: Enforceability and Use of the Actual-to-Projected-Actual Applicability Test in Determining Major Modification Applicability” (Dec. 7, 2017).

<sup>3</sup> Thus, for example, the EPA no longer subscribes to the reading of the NSR regulations that is reflected in the Letter from Barbara A. Finazzo, U.S. EPA Region 2 to Kathleen Antoine, HOVENSA, LLC, “Re: HOVENSA Gas Turbine

1200 PENNSYLVANIA AVE. NW • MAIL CODE 1101A • WASHINGTON, DC 20460 • (202) 564-4700 • FAX: (202) 501-1450

## **Background**

Under EPA regulations, the process for determining whether a project at an existing major stationary source triggers the requirement to obtain an NSR permit is a two-step process. Step 1 requires a determination of whether the proposed project, by itself, is projected to result in a significant emissions increase. If such an increase is projected to occur, the process moves to Step 2. Under Step 2, an evaluation is made as to whether the project will result in a significant *net* emissions increase, considering any other increases and decreases in actual emissions at the source that are contemporaneous with the particular project and are otherwise creditable. The EPA has generally referred to Step 2 as “netting” or “contemporaneous netting.”

In the past, the EPA has sometimes described the consideration of both increases and decreases in emissions under Step 1 of the NSR applicability process as “project netting.” The EPA now recognizes that using the term “project netting” at Step 1 has resulted in confusion among stakeholders, permitting authorities and within the EPA itself. A more appropriate term to characterize the consideration of a proposed project’s emissions increases and decreases at Step 1 is “project emissions accounting.” In the context of Step 1, the term “netting” is misplaced, insofar as “netting” more properly describes looking at those *other* projects that may have been or will be undertaken at a given facility over the contemporaneous period – i.e. an evaluation that takes place under Step 2. In contrast, “project emissions accounting” more accurately captures what Step 1 of the NSR applicability process is really all about – i.e. taking account of the true emissions impacts of the project itself.

The EPA believes that those prior agency statements that interpreted the NSR regulations as precluding project emissions accounting have had the practical effect of preventing certain projects from going forward and significantly delaying others, even though those projects would not have resulted in a significant emissions increase.<sup>4</sup> The EPA recognizes that because of the inherent complexities associated with doing multi-year contemporaneous netting under Step 2 at a large facility,<sup>5</sup> some companies may have been dissuaded from undertaking some projects. As a consequence, the EPA’s lack of clarity in this matter likely foreclosed projects with the potential to make production more efficient across a wide variety of industrial sectors. Such efficiencies can result in reduced emissions, even while production is maintained or expanded. The interpretation provided here is consistent with the language of the NSR regulations and should result in sounder regulatory outcomes.

---

Nitrogen Oxides (GT NOx) Prevention of Significant Deterioration (PSD) Permit Application- Emission Calculation Clarification” (March 30, 2010) (March 30 HOVENSA Letter).

<sup>4</sup> See, e.g. National Mining Association Response to Request for Comments on Regulations Appropriate for Repeal, Replacement, or Modification Pursuant to Executive Order 13777, 82 FR 17,793 (Apr. 13, 2017), at 3-4, EPA-HQ-2017-0190-37770; Testimony of Paul Noe for Am. Forest & Paper Ass’n and Am. Wood Council, House Comm. on Energy & Commerce, Subcomm. on Env’t, Oversight Hearing on “New Source Review Permitting Challenges for Manufacturing and Infrastructure,” at 2, 5, 7-8 (Feb. 14, 2018) (“Noe Testimony”).

<sup>5</sup> See, e.g. Noe Testimony at 7-8.

## **Relevant CAA and Regulatory Provisions**

The NSR provisions of the CAA and the EPA's implementing regulations require that a preconstruction permit be obtained prior to beginning (1) the construction of a new major stationary source or (2) a "major modification" to an existing major stationary source. In general, preconstruction permits for sources emitting pollutants for which the area is designated attainment or unclassifiable and for other pollutants regulated under the major source program are called prevention of significant deterioration (PSD) permits. Permits for major sources emitting nonattainment pollutants and located in nonattainment areas are referred to as nonattainment NSR (NNSR) permits. The preconstruction permitting program, including the PSD and the NNSR permitting programs, is known as the NSR program.

The CAA contains no statutory definition of the term "major modification." The CAA does, however, define the term "modification" – i.e. "any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted." 42 U.S.C. § 7411(a)(4); CAA § 111(a)(4).<sup>6</sup> Reflecting the fact that the preconstruction review provisions of the CAA's PSD and nonattainment area permitting programs are phrased in terms of the construction or modification of a "major emitting facility" (under the PSD program) and of a "major stationary source" (under the nonattainment program),<sup>7</sup> The EPA's implementing regulations have from their earliest days been framed in terms of how one goes about determining whether a particular activity at an existing "major stationary source" will be deemed to be a "major modification."<sup>8</sup> The EPA regulations specify that one determines whether a modification is "major" based on whether the modification results in an increase of emissions above specified rates defining whether the increase is "significant" (or greater than a *de minimis* amount).<sup>9</sup>

A project<sup>10</sup> constitutes a major modification for a regulated NSR pollutant if (and only if) it would result in two types of emissions increases – i.e. a significant emissions increase

---

<sup>6</sup> This definition of "modification," originally enacted by Congress in 1970 as part of the New Source Performance Standards (NSPS) program, was incorporated by reference for purposes of the newly enacted PSD and nonattainment programs by the Clean Air Act Amendments of 1977. See 42 U.S.C. § 7479; CAA § 169(C) ("The term 'construction' when used in connection with any source or facility, includes the modification (as defined in section 7411(a) of this title) of any source or facility."); 42 U.S.C. 7501 (4); CAA § 171 (4) ("The terms 'modifications' and 'modified' mean the same as the term 'modification' as used in section 7411(a)(4) of this title.").

<sup>7</sup> 42 FR 57479, 57480 (Nov. 3, 1977).

<sup>8</sup> See, e.g. 40 CFR § 52.21(a)(2) (1978).

<sup>9</sup> See, e.g. 40 CFR § 52.21(a)(2) (2017). The EPA adopted this current approach after a court rejected the EPA's initial attempt to determine whether a modification was "major" based on the thresholds of 100 and 250 tons per year from the statutory definition of "major emitting facility." *Alabama Power v. Costle*, 636 F.2d 323, 399-400 (D.C. Cir. 2012); 44 FR 51924, 51937 (Sept. 9, 1979); 45 FR 52676, 57705 (Aug. 7, 1980).

<sup>10</sup> A "project" is defined as "a physical change in, or change in the method of operation of, an existing major stationary source." 40 CFR § 52.21(b)(52).

(determined at Step 1), and a significant net emissions increase (determined at Step 2).<sup>11</sup> See, e.g. 40 CFR § 52.21(a)(2)(iv)(a).<sup>12</sup> These NSR applicability procedures, adopted as part of the 2002 NSR Reform rule,<sup>13</sup> codified a prior EPA practice of looking first at whether any emissions increase that may result from the project itself would be significant before evaluating whether there would be a significant “net emissions increase” from the major stationary source as a whole.

The regulations further specify that the particular procedure for calculating whether a proposed project would by itself result in a significant emissions increase depends upon the type of emissions units that would be included in the proposed project.<sup>14</sup> See 40 CFR § 52.21(a)(2)(iv)(b). These different procedures are required because, under the NSR regulations, the specific requirements for determining both the “baseline actual emissions” and the post-change “projected actual emissions” for existing emissions units are different than the requirements for determining the “baseline actual emissions” and the post-change “potential to emit” for new emissions units.

As relevant here, the NSR regulations currently provide as follows:

§ 52.21 Prevention of significant deterioration of air quality.

(a)(1) \* \* \* \*

(2) *Applicability procedures.* (i) The requirements of this section apply to the construction of any new major stationary source (as defined in paragraph (b)(1) of this section) or any project at an existing major stationary source in an area

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<sup>11</sup> The net emissions increase is calculated as the sum of the emissions increase attributable to the particular project, calculated pursuant to 40 CFR § 52.21(a)(2)(iv), and any other increases and decreases in actual emissions at the major stationary source that are contemporaneous and otherwise creditable. See 40 CFR § 52.21(b)(3). Notwithstanding the interpretation of Step 1 communicated in this memorandum, source-wide netting (i.e. Step 2) will continue to have an important role in the NSR applicability process. For example, source-wide netting always will be needed, as appropriate, to allow for consideration of emissions associated with past projects within the contemporaneous period.

<sup>12</sup> This memorandum cites certain provisions in the federal PSD regulations at 40 CFR § 52.21(a)(2). The other NSR regulations, including 40 CFR § 51.166(a)(7), 40 CFR § 51.165(a)(2), and Appendix S of Part 51 (Part IV, Subpart I), contain analogous definitions and requirements, and the interpretation set forth in this memorandum also applies to those analogous provisions. However, there are certain modification provisions under the Title I, Subpart D of the CAA and the EPA nonattainment NSR regulations that apply to certain nonattainment area classifications (see, e.g. CAA § 182(e)(2); 40 CFR Part 51, Appendix S II.A.5.(v)). This memorandum does not address those specific modification provisions in the Act or the EPA regulations for nonattainment areas, and, thus, does not communicate any EPA view regarding interpretation of those provisions.

<sup>13</sup> In 2002, the EPA issued a final rule that revised the regulations governing the major NSR program. 67 FR 80186 (Dec. 31, 2002). The agency refers generally to these rule provisions as the “NSR Reform rule.”

<sup>14</sup> “Emissions unit” is defined, in relevant part, as “any part of a stationary source that emits or would have the potential to emit any regulated NSR pollutant and includes an electric utility steam generating unit as defined in paragraph (b)(31) of this section.” 40 CFR § 52.21(b)(7). An “emissions unit” can be either a “new” unit or an “existing” unit, with a “new” unit being further defined as “any emissions unit that is (or will be) newly constructed and that has existed for less than 2 years from the date such emissions unit first operated.” *Id.* at § 52.21(b)(7)(i). An “existing emissions unit” is any unit that is not a “new emissions unit.” *Id.* at § 52.21(b)(7)(ii).

designated as attainment or unclassifiable under sections 107(d)(1)(A)(ii) or (iii) of the Act.

\* \* \* \*

(iv) The requirements of the program will be applied in accordance with the principles set out in paragraphs (a)(2)(iv)(a) through (f) of this section.

\* \* \* \*

(b) The procedure for calculating (before beginning actual construction) whether a significant emissions increase (i.e. the first step of the process) will occur depends upon the type of emissions units being modified, according to paragraphs (a)(2)(iv)(c) through (f) of this section. The procedure for calculating (before beginning actual construction) whether a significant net emissions increase will occur at the major stationary source (i.e. the second step of the process) is contained in the definition in paragraph (b)(3) of this section. Regardless of any such preconstruction projections, a major modification results if the project causes a significant emissions increase and a significant net emissions increase.

(c) *Actual-to-projected-actual applicability test for projects that only involve existing emissions units.* A significant emissions increase of a regulated NSR pollutant is projected to occur if the sum of the difference between the projected actual emissions (as defined in paragraph (b)(41) of this section) and the baseline actual emissions (as defined in paragraphs (b)(48)(i) and (ii) of this section), for each existing emissions unit, equals or exceeds the significant amount for that pollutant (as defined in paragraph (b)(23) of this section).

(d) *Actual-to-potential test for projects that only involve construction of a new emissions unit(s).* A significant emissions increase of a regulated NSR pollutant is projected to occur if the sum of the difference between the potential to emit (as defined in paragraph (b)(4) of this section) from each new emissions unit following completion of the project and the baseline actual emissions (as defined in paragraph (b)(48)(iii) of this section) of these units before the project equals or exceeds the significant amount for that pollutant (as defined in paragraph (b)(23) of this section).

(e) [Reserved]<sup>[15]</sup>

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<sup>15</sup> While now designated as "reserved," what had been clause (e) of 40 CFR § 52.21(a)(2)(iv) was promulgated as part of the 2002 NSR Reform rule. As originally promulgated, clause (e) read as follows:

(e) *Emissions test for projects that involve Clean Units.* For a project that will be constructed and operated at a Clean Unit without causing the emissions unit to lose its Clean Unit designation, no emissions increase is deemed to occur.

See 67 FR 80275. The Clean Unit provision of the 2002 NSR Reform rule was subsequently held to be unlawful and vacated by the U.S. Court of Appeals for the D.C. Circuit in *State of New York v. EPA*, 413 F.3d 3, 38-40 (D.C. Cir.

(f) *Hybrid test for projects that involve multiple types of emissions units.* A significant emissions increase of a regulated NSR pollutant is projected to occur if the sum of the emissions increases for each emissions unit, using the method specified in paragraphs (a)(2)(iv)(c) through (d) of this section as applicable with respect to each emissions unit, for each type of emissions unit equals or exceeds the significant amount for that pollutant (as defined in paragraph (b)(23) of this section).

40 CFR § 52.21(a)(2)(iv)(b)-(f).

### **The EPA's Interpretation of the NSR Applicability Provisions**

Based on the reconsideration of some previous conclusions and an examination of the regulations as a whole, the EPA now interprets the provisions set forth in 40 CFR § 52.21(a)(2)(iv)(c) through (iv)(f) as providing that any emissions *decreases* that may result from a given proposed project are to be considered when calculating at Step 1 whether the proposed project will result in a significant emissions increase. This interpretation is grounded in the principle that the “plain language of the CAA indicates that Congress intended to apply NSR to *changes that increase actual emissions.*” *State of New York v. EPA*, 413 F.3d at 40 (emphasis added). Central to the CAA’s definition of “modification” is that there must be a causal link between the physical or operational change at issue – i.e. the “project” – and any change in emissions that may ensue. In other words, it is necessary to account for the full and direct effect of the proposed change itself. Accordingly, at the very outset of the process for determining whether NSR may be triggered, the EPA should give attention to not only whether emissions may increase from those units that are part of the project but also whether emissions may at the same time decrease at other units that are also part of the project.

The use of the phrase “sum of the difference” in clauses (c) and (d) of 40 CFR § 52.21(a)(2)(iv) makes this clear. The “difference” between a unit’s projected actual emissions or potential to emit (following the completion of the project) and its baseline actual emissions (prior to the project) may be either a positive number (representing a projected increase) or a negative number (representing a projected decrease). In either case, the values that result from “summing” the “difference” are to be taken into consideration at Step 1 in determining the emissions impact of the project.

Some have argued that, in the case of projects involving only new units, the “sum of the difference” could never include a decrease in emissions, because the applicable test compares the potential to emit following the project to pre-project baseline actual emissions, which are equal to

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2005). Thereafter, all of the regulatory language related to the Clean Unit provision, including clause (e) of 40 CFR § 52.21(a)(2)(iv), was stricken from the NSR Reform rule. *See* 72 FR 32526, 32528 (June 13, 2007). Also affected by the D.C. Circuit’s vacatur was certain language of clause (f) of 40 CFR § 52.21(a)(2)(iv) as it had originally been promulgated in 2002. Struck from clause (f) was a final sentence that provided: “For example, if a project involves both an existing unit and a Clean Unit, the projected increase is determined by summing the values determined using the method specified in paragraph (a)(2)(iv)(c) of this section for the existing unit and using the method specified in paragraph (a)(2)(iv)(e) of this section for the Clean Unit.” *See* 67 FR 80275; 72 FR 32529.

zero.<sup>16</sup> What this argument overlooks is that the NSR regulations define a “new unit” as “any emissions unit that is (or will be) newly constructed and that has existed *for less than 2 years* from the date such emission unit first operated” 40 CFR § 52.21(b)(7)(i) (emphasis added), and for a new unit “the baseline actual emissions for purposes of determining the emissions increase that will result from the initial construction and operation of such unit shall equal zero,” and “thereafter, for all other purposes, shall equal the unit’s potential to emit.” 40 CFR § 52.21(b)(48)(iii). Therefore, following initial construction or permitting, a “new unit” (i.e. one that has existed for less than two years since it first operated) could, as the result of a particular project, experience a decrease in potential emissions – that is, the “sum of the difference” could be a negative number – if that project involved, for instance, the installation of controls on the unit, resulting in a decrease in the unit’s potential to emit.<sup>17</sup>

The phrase “sum of the difference” does not appear in clause (f) of 40 CFR § 52.21(a)(2)(iv). This omission, and the fact that clause (f) speaks of the “sum of the emissions increases,” led the EPA to say in a September 2006 notice of proposed rulemaking that this “challenges whether an emissions increase at an individual emissions unit can be a negative number.” See 71 FR 54249 (Sept. 14, 2006). While the EPA went on to say that it was “reasonable to conclude that a source can perform project netting for hybrid [projects] as well,” the agency also indicated that the “current rule . . . would not allow a source to include reductions from units that are part of the project until Step 2 of the calculation.” *Id.* It was on that basis that the EPA proposed new regulatory language that was directed at making it explicit that emissions decreases as well as increases would be accounted for at Step 1 for projects involving both existing and new units. *Id.* at 54252.

Based on a more thorough consideration of the surrounding context in the regulations, the EPA finds that the negative inference which the agency drew in 2006 from the fact that the phrase “sum of the difference” is absent from clause (f) was unwarranted.<sup>18</sup> Other language in clause (f)

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<sup>16</sup> It was on this basis that the EPA previously said that, because the “sum of the difference” for a project that only involves new emissions units must entail summing only emissions increases, this result should also inform the reading of the “sum of the difference” as the phrase is applied to projects involving only existing units, leading to the conclusion that taking account of emissions decreases at Step 1 is not permitted at all. See March 30 HOVENSA Letter at 5. As was previously noted, the EPA no longer subscribes to the reading of the NSR regulations reflected in the March 30 HOVENSA Letter.

<sup>17</sup> In its March 30 HOVENSA Letter, the EPA also stated that “EPA would not have needed to provide a special provision and unique rationale for the replacement unit rule if EPA had intended to allow project netting under the 2002 NSR Reform Rule.” March 30 HOVENSA Letter at 4. But this does not follow. Absent the provision, a replacement unit would be deemed a new emissions unit to which the actual-to-potential test would apply instead of the actual-to-projected-actual test applicable to existing units (including replacement units). This difference between the two applicability tests remains regardless of whether emissions decreases are accounted for at Step 1.

<sup>18</sup> This negative inference previously led the EPA to adopt the view that this provision did not allow “project netting.” 71 FR at 54249, and thus that it was necessary to propose an amendment to 40 CFR § 52.21(a)(2)(iv)(f) to allow project emission accounting for hybrid projects. 71 FR at 54251. Since the EPA no longer considers the negative inference to be warranted, the agency also does not believe it is necessary to finalize the proposed 2006 revision before project emissions accounting can be conducted in Step 1 of the NSR applicability analysis for hybrid projects. However, the EPA is not taking action at this time to withdraw the project netting elements of the 2006 notice of proposed rulemaking. The EPA is still evaluating whether a revision of the text of 40 CFR § 52.21(a)(2)(iv)(f) is desirable to provide additional clarity on this issue.

indicates that emissions decreases are also to be accounted for. Clause (f) specifically provides that the “sum of the emissions increases for each emissions unit” is to be calculated *after* the specific impact of the proposed project has been ascertained with respect to each type of unit involved, “using the method specified in paragraphs (a)(2)(iv)(c) through (d) of this section *as applicable with respect to each emission unit.*” (emphasis added). That is, for a project involving both existing and new units, this accounting is to be done on a unit type-by-unit type basis, in which both emissions decreases (if any) and emissions increases (if any) are to be taken into consideration.

Moreover, the history of this provision in the regulations indicates that the EPA originally intended that project emissions accounting be allowed at Step 1 for projects involving different types of units. The concluding “For example . . .” sentence that had originally been part of clause (f) but which had been stricken (for unrelated reasons) when the Clean Unit provision was vacated, *see* note 15 above, illustrates the agency’s intention. That sentence provided that, where a proposed project involves different types of units, the determination whether there is a projected increase is to be made by “summing the *values determined using* the method specified in paragraph (a)(2)(iv)(c) of this section for the existing unit and using the method specified in paragraph (a)(2)(iv)(e) of this section for the Clean Unit.” (emphasis added). If one were to substitute “new unit” for “Clean Unit” and “paragraph (a)(2)(iv)(d)” for “paragraph (a)(2)(iv)(e),” by way of providing a different “example,” the point remains. Since the “values” derived from calculating the “sum of the difference” with respect to both existing units and new units could be a negative number, the language used in clause (f) – “sum of the emissions increases” – presents no “challenge” to the use of project emissions accounting, i.e. taking account of emissions decreases as well as emissions increases, under the current regulatory language pertaining to projects that involve both existing and new units.

The EPA does not interpret the existing regulations as requiring that a decrease be creditable or enforceable as a practical matter in order to be considered at Step 1. The issue of whether an emissions decrease is creditable and enforceable is relevant to Step 2, but not to Step 1. Regarding this, in the 2002 NSR Reform rule, the EPA expressly declined to adopt a requirement under which a source’s post-project projected actual emissions would have become an enforceable emission limitation. Such an approach had previously been suggested by the EPA, but the agency ultimately rejected it. *See* 67 FR 80193, 80197. The same reasoning that underpinned the 2002 NSR Reform rule’s treatment of projected actual increases applies equally to projected emissions decreases at Step 1. One exception to this is where an emissions decrease is calculated using the potential to emit of a unit after the project. In such a case, the requirements of 40 CFR § 52.21(b)(4) would continue to apply.

The EPA also promulgated, as part of its adoption of provisions addressing the use of the “projected actual emissions” methodology, provisions pertaining to the tracking, documenting, and, under certain circumstances, the reporting of post-project emissions increases. *See, e.g.* 40 CFR §§ 52.21(b)(41), 52.21(r)(6). Those provisions would impose on sources the same obligations with respect to emissions decreases taken account of at Step 1. Given this, the EPA should not treat projected increases and projected decreases differently at Step 1, by requiring that decreases

be “credible” and “enforceable,” as would be the case with contemporaneous decreases accounted for at Step 2.<sup>19</sup>

Finally, it is important to point out that project emissions accounting, as described above, is a calculation that is done in conjunction with ascertaining, prior to beginning actual construction, the applicability of NSR to a particular project at a source that the owner/operator is itself *proposing* to undertake. In this regard, the EPA recognizes that as a general matter, the source itself is responsible for defining the scope of its own “project,” subject to the understanding that the source cannot seek to circumvent NSR by characterizing the proposed project in a way that would separate into multiple projects those activities that, by any reasonable standard, constitute a single project. Subject to the equivalent understanding that it might be possible to circumvent NSR through some wholly artificial grouping of activities, the EPA does not interpret its NSR regulations as directing the agency to preclude a source from reasonably defining its proposed project broadly, to reflect multiple activities. The EPA will speak more to this issue in planned upcoming action on “project aggregation.”

\* \* \* \*

The EPA Regional Offices should send this memorandum to states within their jurisdiction. For any questions concerning this memorandum, please contact Anna Marie Wood in the Office of Air Quality Planning and Standards at (919) 541-3604 or [wood.anna@epa.gov](mailto:wood.anna@epa.gov).

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<sup>19</sup> In the September 2006 notice of proposed rulemaking, the EPA had proposed to adopt regulatory language that specified, for the purposes of what was then termed “project netting,” that emissions decreases must be credible or otherwise enforceable as a practicable matter. *See* 71 FR 54252. At that time, the EPA provided no explanation why it considered such a requirement to be either necessary or warranted, and the agency now recognizes that other provisions in existing regulations serve to alleviate concerns that projected emissions decreases would escape the same tracking, documentation and reporting requirement applicable to projected emissions increases. As discussed in footnote 18, the EPA is not withdrawing the September 2006 proposal at this time, pending further consideration of whether a revision of the regulatory text is desirable to provide further clarity.

**To:** Dunn, Alexandra[dunn.alexandra@epa.gov]; Lopez, Peter[lopez.peter@epa.gov]; Servidio, Cosmo[Servidio.Cosmo@epa.gov]; Glenn, Trey[Glenn.Trey@epa.gov]; Stepp, Cathy[stepp.cathy@epa.gov]; Idsal, Anne[idsal.anne@epa.gov]; Gulliford, Jim[gulliford.jim@epa.gov]; Benevento, Douglas[benevento.douglas@epa.gov]; Strauss, Alexis[Strauss.Alexis@epa.gov]; Hladick, Christopher[hladick.christopher@epa.gov]

**Cc:** Wehrum, Bill[Wehrum.Bill@epa.gov]; Lewis, Josh[Lewis.Josh@epa.gov]; Fonseca, Silvina[Fonseca.Silvina@epa.gov]; Johnson, Laura-S[Johnson.Laura-S@epa.gov]; Gaines, Cynthia[Gaines.Cynthia@epa.gov]; Moritz, Brigitte[Moritz.Brigette@epa.gov]

**From:** Hope, Brian

**Sent:** Tue 3/13/2018 5:51:40 PM

**Subject:** Project Emissions Accounting - NSR Preconstruction Permitting Program

[NSR Preconstruction Emissions Accounting.3.12.18.pdf](#)

Please see the attached memorandum from Administrator Pruitt titled Project Emissions Accounting Under the New Source Review Preconstruction Permitting Program.

**To:** Wehrum, Bill[Wehrum.Bill@epa.gov]  
**From:** Bodine, Susan  
**Sent:** Thur 3/1/2018 1:13:24 AM  
**Subject:** Re: Project Netting Guidance

Thank you

Sent from my iPad

On Feb 28, 2018, at 6:47 PM, Wehrum, Bill <[Wehrum.Bill@epa.gov](mailto:Wehrum.Bill@epa.gov)> wrote:

Hi Susan. Thanks for the comments on the memo.

## Ex. 5 - Deliberative Process

---

Bill Wehrum

Assistant Administrator

Office of Air and Radiation

U.S. Environmental Protection Agency

(202) 564-7404

**From:** Bodine, Susan  
**Sent:** Wednesday, February 28, 2018 12:10 PM  
**To:** Wehrum, Bill <[Wehrum.Bill@epa.gov](mailto:Wehrum.Bill@epa.gov)>  
**Subject:** Project Netting Guidance

Bill,

AED staff are providing a technical clarification to the netting guidance to OAR staff, described below.

## Ex. 5 - Deliberative Process

Susan

**From:** Bodine, Susan

**Sent:** Wednesday, February 28, 2018 8:43 AM

**To:** Brooks, Phillip <[Brooks.Phillip@epa.gov](mailto:Brooks.Phillip@epa.gov)>; Kelley, Rosemarie <[Kelley.Rosemarie@epa.gov](mailto:Kelley.Rosemarie@epa.gov)>

**Cc:** Traylor, Patrick <[traylor.patrick@epa.gov](mailto:traylor.patrick@epa.gov)>; Starfield, Lawrence <[Starfield.Lawrence@epa.gov](mailto:Starfield.Lawrence@epa.gov)>

**Subject:** FW: Project Netting Guidance

Has AED raised the issue discussed below with OAR?

Susan

Begin forwarded message:

**From:** "Traylor, Patrick" <[traylor.patrick@epa.gov](mailto:traylor.patrick@epa.gov)>

**Date:** February 26, 2018 at 5:58:20 PM MST

**To:** "Dykes, Teresa" <[Dykes.Teresa@epa.gov](mailto:Dykes.Teresa@epa.gov)>

**Subject:** Re: Project Netting Guidance

## **Ex. 5 - Deliberative Process**

**Patrick Traylor**

Deputy Assistant Administrator

Office of Enforcement and Compliance Assurance

U.S. Environmental Protection Agency

(202) 564-5238 (office)

(202) 809-8796 (cell)

On Feb 26, 2018, at 2:33 PM, Dykes, Teresa <[Dykes.Teresa@epa.gov](mailto:Dykes.Teresa@epa.gov)> wrote:

## **Ex. 5 - Deliberative Process**

# **Ex. 5 - Deliberative Process**

Terri Dykes

Senior Attorney

Office of Enforcement and Compliance Assurance

1200 Pennsylvania Ave. NW

Washington, DC 20460

202.564.9883

*CONFIDENTIAL: This transmission may contain deliberative and/or enforcement confidential, attorney-client, or otherwise privileged material. Do not release under FOIA without appropriate review. If you have received this message in error, you are asked to notify the sender and to delete this message.*

**From:** Traylor, Patrick  
**Sent:** Monday, February 26, 2018 4:02 PM  
**To:** Dykes, Teresa <[Dykes.Teresa@epa.gov](mailto:Dykes.Teresa@epa.gov)>  
**Subject:** Re: Project Netting Guidance

## **Ex. 5 - Deliberative Process**

**Patrick Traylor**

Deputy Assistant Administrator

Office of Enforcement and Compliance Assurance

U.S. Environmental Protection Agency

(202) 564-5238 (office)

(202) 809-8796 (cell)

On Feb 26, 2018, at 2:40 PM, Dykes, Teresa <[Dykes.Teresa@epa.gov](mailto:Dykes.Teresa@epa.gov)> wrote:

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Senior Attorney

Office of Enforcement and Compliance Assurance

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Washington, DC 20460

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**From:** Traylor, Patrick  
**Sent:** Monday, February 26, 2018 12:52 PM  
**To:** Brooks, Phillip <[Brooks.Phillip@epa.gov](mailto:Brooks.Phillip@epa.gov)>; Dykes, Teresa <[Dykes.Teresa@epa.gov](mailto:Dykes.Teresa@epa.gov)>; Chapman, Apple <[Chapman.Apple@epa.gov](mailto:Chapman.Apple@epa.gov)>; Kelley, Rosemarie <[Kelley.Rosemarie@epa.gov](mailto:Kelley.Rosemarie@epa.gov)>  
**Subject:** Project Netting Guidance

All:

I've evaluated the project netting guidance memorandum. Regretfully, I have to catch a flight soon and won't be able to sit down in person to discuss this matter. Instead, I've included my thoughts in comments to the memorandum.

## Ex. 5 - Deliberative Process

Patrick

**Patrick Traylor**

Deputy Assistant Administrator

Office of Enforcement and Compliance Assurance

U.S. Environmental Protection Agency

(202) 564-5238 (office)

(202) 809-8796 (cell)

**To:** Wehrum, Bill[Wehrum.Bill@epa.gov]  
**From:** Harlow, David  
**Sent:** Thur 3/1/2018 12:08:05 AM  
**Subject:** RE: Project Netting Guidance

## **Ex. 5 - Deliberative Process**

# Ex. 5 - Deliberative Process

**David S. Harlow**  
**Senior Counsel**

**Immediate Office of the Assistant Administrator**  
**Office of Air and Radiation, USEPA**  
**WJC-N Room 5409K**

**1200 Pennsylvania Avenue NW**  
**Washington, DC 20460**  
**202-564-1233**

[Harlow.David@epa.gov](mailto:Harlow.David@epa.gov)

**From:** Wehrum, Bill  
**Sent:** Wednesday, February 28, 2018 6:49 PM  
**To:** Harlow, David <harlow.david@epa.gov>  
**Subject:** FW: Project Netting Guidance

fyi

---

Bill Wehrum

Assistant Administrator

Office of Air and Radiation

U.S. Environmental Protection Agency

(202) 564-7404

**From:** Bodine, Susan  
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Susan

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**Cc:** Traylor, Patrick <[traylor.patrick@epa.gov](mailto:traylor.patrick@epa.gov)>; Starfield, Lawrence <[Starfield.Lawrence@epa.gov](mailto:Starfield.Lawrence@epa.gov)>

**Subject:** FW: Project Netting Guidance

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Susan

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**Date:** February 26, 2018 at 5:58:20 PM MST  
**To:** "Dykes, Teresa" <[Dykes.Teresa@epa.gov](mailto:Dykes.Teresa@epa.gov)>  
**Subject:** Re: Project Netting Guidance

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**Patrick Traylor**

Deputy Assistant Administrator

Office of Enforcement and Compliance Assurance

U.S. Environmental Protection Agency

(202) 564-5238 (office)

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On Feb 26, 2018, at 2:40 PM, Dykes, Teresa <[Dykes.Teresa@epa.gov](mailto:Dykes.Teresa@epa.gov)> wrote:

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Terri Dykes

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**Subject:** Project Netting Guidance

All:

I've evaluated the project netting guidance memorandum. Regretfully, I have to catch a flight soon and won't be able to sit down in person to discuss this matter. Instead, I've included my thoughts in comments to the memorandum.

Ex. 5 - Deliberative Process

## Ex. 5 - Deliberative Process

Patrick

**Patrick Traylor**

Deputy Assistant Administrator

Office of Enforcement and Compliance Assurance

U.S. Environmental Protection Agency

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(202) 809-8796 (cell)

**To:** Palmieri, Rosario A. EOP/OMB **Ex. 6 - Personal Privacy** Whiteman, Chad S.  
**EOP/OMB** **Ex. 6 - Personal Privacy**  
**Cc:** Wehrum, Bill[Wehrum.Bill@epa.gov]; Harlow, David[harlow.david@epa.gov]  
**From:** Lewis, Josh  
**Sent:** Fri 3/9/2018 8:32:26 PM  
**Subject:** Passback re: NSR memo  
Project Emissions Accounting Guidance Memorandum 3-9-18.Passback2.docx

Bill and David asked me to send this redline/strikeout version showing changes made following the 12:30 call.

Josh Lewis

Chief of Staff

EPA/Office of Air and Radiation

Office: 202 564 2095

**To:** Wehrum, Bill[Wehrum.Bill@epa.gov]  
**Cc:** Harlow, David[harlow.david@epa.gov]  
**From:** Lewis, Josh  
**Sent:** Fri 3/9/2018 7:38:12 PM  
**Subject:** NSR memo - ready for OIRA  
[Project Emissions Accounting Guidance Memorandum 3-9-18.Passback2.docx](#)

Edits made as you requested, and David has double-checked for accuracy.

Josh

**To:** Wehrum, Bill[Wehrum.Bill@epa.gov]  
**From:** Palmieri, Rosario A. EOP/OMB  
**Sent:** Fri 3/9/2018 4:03:38 AM  
**Subject:** Re: NSR Memo

Moved to 12:30.

On Mar 8, 2018, at 8:37 PM, Wehrum, Bill <Wehrum.Bill@epa.gov> wrote:

Will do. If we can set the call for 12:30, I will plan to participate with my team.

Ex. 5 - Deliberative Process

### **Ex. 5 - Deliberative Process**

Bill Wehrum  
Assistant Administrator  
Office of Air and Radiation  
U.S. Environmental Protection Agency  
(202) 564-7404

On Mar 8, 2018, at 8:21 PM, Palmieri, Rosario A. EOP/OMB wrote:

Ex. 6 - Personal Privacy

## **Ex. 5 - Deliberative Process**

**From:** Wehrum, Bill [mailto:Wehrum.Bill@epa.gov]

**Sent:** Thursday, March 8, 2018 4:37 PM

**To:** Palmieri, Rosario A. EOP/OMB <Ex. 6 - Personal Privacy>

**Subject:** RE: NSR Memo

Understood. Thanks Rosario.

---

Bill Wehrum

Assistant Administrator

Office of Air and Radiation

U.S. Environmental Protection Agency

(202) 564-7404

**From:** Palmieri, Rosario A. EOP/OMB  
**Sent:** Thursday, March 8, 2018 4:19 PM  
**To:** Wehrum, Bill <[Wehrum.Bill@epa.gov](mailto:Wehrum.Bill@epa.gov)>  
**Cc:** Gunasekara, Mandy <[Gunasekara.Mandy@epa.gov](mailto:Gunasekara.Mandy@epa.gov)>  
**Subject:** RE: NSR Memo

**Ex. 6 - Personal Privacy**

Just want to sensitize you to the fact we didn't get this until after 3PM and

Ex. 5 - Deliberative Process

## **Ex. 5 - Deliberative Process**

We would appreciate your help with making sure your team follows these practices in the future. I'll send you an update in a few hours.

**From:** Palmieri, Rosario A. EOP/OMB  
**Sent:** Thursday, March 8, 2018 1:18 PM  
**To:** 'Wehrum, Bill' <[Wehrum.Bill@epa.gov](mailto:Wehrum.Bill@epa.gov)>  
**Cc:** 'Gunasekara, Mandy' <[Gunasekara.Mandy@epa.gov](mailto:Gunasekara.Mandy@epa.gov)>  
**Subject:** RE: NSR Memo

Thanks, Bill

**Ex. 5 - Deliberative Process**

## Ex. 5 - Deliberative Process

**From:** Wehrum, Bill [<mailto:Wehrum.Bill@epa.gov>]

**Sent:** Thursday, March 8, 2018 1:04 PM

**To:** Palmieri, Rosario A. EOP/OMB <[Ex. 6 - Personal Privacy](#)>

**Cc:** Gunasekara, Mandy <[Gunasekara.Mandy@epa.gov](mailto:Gunasekara.Mandy@epa.gov)>

**Subject:** NSR Memo

Rosario –

**Ex. 5 - Deliberative Process**

**Ex. 5 - Deliberative Process**

A revised version is being prepared and will be sent to your office (probably to Chad) in a short while. Please feel free to contact me if you have any further comments or questions.

**Ex. 5 - Deliberative Process**

## Ex. 5 - Deliberative Process

---

Bill Wehrum

Assistant Administrator

Office of Air and Radiation

U.S. Environmental Protection Agency

(202) 564-7404

**To:** Wehrum, Bill[Wehrum.Bill@epa.gov]  
**From:** Harlow, David  
**Sent:** Sat 2/17/2018 2:13:30 AM  
**Subject:** Re: Revised version of "project netting" memorandum

The pleasure, truly, has been all mine. I suppose, at some point, this all might stop being so much fun. But it ain't happened yet.

Sent from my iPhone

On Feb 16, 2018, at 8:16 PM, Wehrum, Bill <[Wehrum.Bill@epa.gov](mailto:Wehrum.Bill@epa.gov)> wrote:

Thanks David. I look forward to reading this. I continue to greatly appreciate your willingness to join me at EPA. Hope you have a great weekend.

---

Bill Wehrum  
Assistant Administrator  
Office of Air and Radiation  
U.S. Environmental Protection Agency  
(202) 564-7404

On Feb 16, 2018, at 7:42 PM, Harlow, David <[harlow.david@epa.gov](mailto:harlow.david@epa.gov)> wrote:

Bill,

## **Ex. 5 - Deliberative Process**

## Ex. 5 - Deliberative Process

I hope you enjoy the long weekend. It appears to me that the past few weeks have seen you having to move at a pretty brisk pace,

Ex. 5 - Deliberative Process

You deserve a bit of a breather. Better (or at least more enjoyable) to go anaerobic on some tough runs this weekend, if oxygen deprivation is going to be on the menu.

See you Tuesday.

David S. Harlow

**Senior Counsel**

**Immediate Office of the Assistant Administrator  
Office of Air and Radiation, USEPA  
WJC-N Room 5409K**

**1200 Pennsylvania Avenue NW  
Washington, DC 20460  
202-564-1233**

**[Harlow.David@epa.gov](mailto:Harlow.David@epa.gov)**

<dshCleanProject Netting Guidance Memo 021418 - .docx>

<dshRedlineProject Netting Guidance Memo 021418.docx>

**To:** Wehrum, Bill[Wehrum.Bill@epa.gov]  
**From:** Harlow, David  
**Sent:** Thur 2/15/2018 1:21:48 AM  
**Subject:** Re: Draft "project netting" memorandum

## Ex. 5 - Deliberative Process

Sent from my iPhone

On Feb 14, 2018, at 6:23 PM, Wehrum, Bill <Wehrum.Bill@epa.gov> wrote:

Thanks David. On a quick review, this looks pretty good.

**Ex. 5 - Deliberative Process**

**Ex. 5 - Deliberative Process**

Let's discuss prior to tomorrow's call.

---

Bill Wehrum  
Assistant Administrator  
Office of Air and Radiation  
U.S. Environmental Protection Agency  
(202) 564-7404

On Feb 14, 2018, at 5:52 PM, Harlow, David <harlow.david@epa.gov> wrote:

Bill,

As you may be aware/recall, scheduled for tomorrow (Thursday) at 12:15 p.m., is the "NSR update meeting," our periodic briefing with Anna and the NSR reform work group (e.g., Bill Harnett, Juan Santiago, etc.). Various matters are on the agenda, as I understand it from Anna and Bill (with whom I had a call earlier this afternoon), but one thing that will come up is the NSR "deliverable" for February, which is a guidance memorandum on "project netting."<sup>1</sup> Anna sent to me a short while ago the most recent OAQPS draft. It is attached. I pass it along should you wish to take a look at it prior

to tomorrow's meeting. From my point of view, you certainly shouldn't feel "obligated" to look at it between now and then. But I thought I would give you the opportunity if you were so inclined.

## **Ex. 5 - Deliberative Process**

## **Ex. 5 - Deliberative Process**

**David S. Harlow**  
**Senior Counsel**

**Immediate Office of the Assistant Administrator**  
**Office of Air and Radiation, USEPA**  
**WJC-N Room 5409K**

**1200 Pennsylvania Avenue NW**  
**Washington, DC 20460**  
**202-564-1233**

[Harlow.David@epa.gov](mailto:Harlow.David@epa.gov)

<Project Netting Guidance Memo 021418.docx>

**To:** Wehrum, Bill[Wehrum.Bill@epa.gov]  
**From:** Harlow, David  
**Sent:** Fri 2/2/2018 11:28:36 PM  
**Subject:** FW: LTB "Project Netting" letter  
dshLBT PN Phase I draft 1-31-18.DOCX

FYI and awareness.

**David S. Harlow**  
**Senior Counsel**

**Immediate Office of the Assistant Administrator**  
**Office of Air and Radiation, USEPA**  
**WJC-N Room 5409K**

**1200 Pennsylvania Avenue NW**  
**Washington, DC 20460**  
**202-564-1233**

[Harlow.David@epa.gov](mailto:Harlow.David@epa.gov)

**From:** Harlow, David  
**Sent:** Friday, February 2, 2018 6:28 PM  
**To:** Wood, Anna <Wood.Anna@epa.gov>  
**Cc:** Santiago, Juan <Santiago.Juan@epa.gov>; Harnett, Bill <Harnett.Bill@epa.gov>  
**Subject:** RE: LTB "Project Netting" letter

All,

I've taken a crack at implementing Bill W's thoughts with respect to the draft LTB letter.

**Ex. 5 - Deliberative Process**

**Ex. 5 - Deliberative Process**

Along the way, you'll see I've also made a few stylistic changes, reflecting

# Ex. 5 - Deliberative Process

Thank you. I trust you all will have a good weekend.

**David S. Harlow**  
**Senior Counsel**

**Immediate Office of the Assistant Administrator**  
**Office of Air and Radiation, USEPA**  
**WJC-N Room 5409K**

**1200 Pennsylvania Avenue NW**  
**Washington, DC 20460**  
**202-564-1233**

[Harlow.David@epa.gov](mailto:Harlow.David@epa.gov)

**From:** Wood, Anna  
**Sent:** Friday, February 2, 2018 5:22 PM  
**To:** Harlow, David <[harlow.david@epa.gov](mailto:harlow.david@epa.gov)>  
**Cc:** Santiago, Juan <[Santiago.Juan@epa.gov](mailto:Santiago.Juan@epa.gov)>; Harnett, Bill <[Harnett.Bill@epa.gov](mailto:Harnett.Bill@epa.gov)>  
**Subject:** RE: LTB "Project Netting" letter

Sounds good, thx!

**From:** Harlow, David  
**Sent:** Friday, February 02, 2018 4:29 PM  
**To:** Wood, Anna <[Wood.Ann@epa.gov](mailto:Wood.Ann@epa.gov)>  
**Cc:** Santiago, Juan <[Santiago.Juan@epa.gov](mailto:Santiago.Juan@epa.gov)>; Harnett, Bill <[Harnett.Bill@epa.gov](mailto:Harnett.Bill@epa.gov)>  
**Subject:** RE: LTB "Project Netting" letter

Anna,

## **Ex. 5 - Deliberative Process**

**David S. Harlow**  
**Senior Counsel**

**Immediate Office of the Assistant Administrator**  
**Office of Air and Radiation, USEPA**  
**WJC-N Room 5409K**

**1200 Pennsylvania Avenue NW**  
**Washington, DC 20460**  
**202-564-1233**

[Harlow.David@epa.gov](mailto:Harlow.David@epa.gov)

**From:** Wood, Anna  
**Sent:** Friday, February 2, 2018 2:22 PM  
**To:** Harlow, David <[harlow.david@epa.gov](mailto:harlow.david@epa.gov)>  
**Cc:** Santiago, Juan <[Santiago.Juan@epa.gov](mailto:Santiago.Juan@epa.gov)>; Harnett, Bill <[Harnett.Bill@epa.gov](mailto:Harnett.Bill@epa.gov)>  
**Subject:** RE: LTB "Project Netting" letter

## **Ex. 5 - Deliberative Process**

Once we get your edits on the PN draft, we will incorporate/address those edits and also convert the substance of the letter into a memorandum (so we have a letter and a memorandum) and I think we can also have this turned around before the Feb 12<sup>th</sup> meeting.

Thanks again and please let me know if this all sounds OK to you. Hope you have a great weekend, Anna

**From:** Harlow, David

**Sent:** Friday, February 02, 2018 2:03 PM

**To:** Wood, Anna <[Wood.Ann@epa.gov](mailto:Wood.Ann@epa.gov)>

**Cc:** Santiago, Juan <[Santiago.Juan@epa.gov](mailto:Santiago.Juan@epa.gov)>; Harnett, Bill <[Harnett.Bill@epa.gov](mailto:Harnett.Bill@epa.gov)>

**Subject:** LTB "Project Netting" letter

Anna,

## **Ex. 5 - Deliberative Process**

# **Ex. 5 - Deliberative Process**

Thanks!

**David S. Harlow**  
**Senior Counsel**

**Immediate Office of the Assistant Administrator**  
**Office of Air and Radiation, USEPA**  
**WJC-N Room 5409K**

**1200 Pennsylvania Avenue NW**  
**Washington, DC 20460**  
**202-564-1233**

[Harlow.David@epa.gov](mailto:Harlow.David@epa.gov)



ESCOT PRUITT  
ADMINISTRATOR

March 20, 1983

**MEMORANDUM**

**SUBJECT:** ~~Tr~~ ~~o~~ ~~j~~ ~~e~~ ~~n~~ ~~c~~ ~~i~~ ~~t~~ ~~s~~ ~~A~~ ~~c~~ ~~c~~ ~~o~~ ~~u~~ ~~n~~ ~~t~~ ~~i~~ ~~n~~ ~~g~~ ~~U~~ ~~n~~ ~~d~~ ~~e~~ ~~r~~ ~~t~~ ~~h~~ ~~e~~ ~~N~~ ~~e~~ ~~w~~ ~~S~~ ~~o~~ ~~u~~ ~~t~~ ~~h~~ ~~e~~ ~~r~~ ~~e~~ ~~v~~ ~~e~~ ~~r~~ ~~W~~ ~~e~~ ~~r~~ ~~c~~ ~~o~~ ~~n~~ ~~s~~ ~~t~~ ~~r~~ ~~u~~ ~~c~~ ~~t~~ ~~i~~ ~~o~~ ~~n~~ ~~s~~ ~~P~~ ~~e~~ ~~r~~ ~~m~~ ~~i~~ ~~t~~ ~~t~~ ~~i~~ ~~n~~ ~~g~~

**FROM:** E S c o t p r u i t t

**TO:** Regional Administrators

In accordance with the provisions of the Clean Air Act, the Administrator is hereby notifying you that the New South Wales Government has submitted to the Administrator for review and comment a proposed regulation which would require the installation of certain air pollution control devices on new and existing industrial facilities. The Administrator is hereby notifying you that the New South Wales Government has submitted to the Administrator for review and comment a proposed regulation which would require the installation of certain air pollution control devices on new and existing industrial facilities.

On the basis of the information received from the New South Wales Government, the Administrator is hereby notifying you that the New South Wales Government has submitted to the Administrator for review and comment a proposed regulation which would require the installation of certain air pollution control devices on new and existing industrial facilities. The Administrator is hereby notifying you that the New South Wales Government has submitted to the Administrator for review and comment a proposed regulation which would require the installation of certain air pollution control devices on new and existing industrial facilities.

<sup>1</sup> See the New South Wales Government's submission to the Administrator for review and comment, dated March 17, 1983, at page 1 of 1.

<sup>2</sup> See, "New South Wales Government's submission to the Administrator for review and comment, dated March 17, 1983, at page 1 of 1."

<sup>3</sup> The New South Wales Government's submission to the Administrator for review and comment, dated March 17, 1983, at page 1 of 1.

## Background

Under the Equal Employment Opportunity Act of 1962, the Department of Labor is required to conduct a study of the employment situation in the United States. The Department is also required to conduct a study of the employment situation in the United States. The Department is also required to conduct a study of the employment situation in the United States.

Irt hpea st tHeP A assume tdiemsecst hdeends i doefratt hionae s  
de cr è a m è s s i n d S e t s e p f t h N e S F a p p l i p a b a t s' s p r y o n j e e t c t T i m e g . "  
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i ' s p r e j m e s t a c o o a r t h h c o g n . o " S x t p h t e e f m e t i t r i n s g p " l i a n c e o d f , a r  
a s n e t r t o i p e g d p d e e r s l c y r d o l e i s h g o s t e p e r o j t e r a t t s a b e e w i b l e l  
u n d e r a t a g k e a n c o v t h c o n t e m p p e a n i e a d e v a l u a t a t p o s a c e  
u n d e t e r p o n t " r p a r s o j m e i s t a c o o s m d a e g u c a p e w h y s e t s e p f  
t h N e S F a p p l i p a b a t s' s s a b o l o l u y t t e a . k a i m g o u f i n t e r u n e i s s i m p a s t s  
o f h p e r o i j e s d l f .

[illegible]

Nitro Oxide (NOx) Prevents Gliofibrin Degradation (Pre-Stroke Ampli-Eantiis Cn-0 Population Clarification) (March 2007) (MAGDOVSNAL letter).

[illegible]

<sup>5</sup> See No. 7 test item 8y.

## Relevant Antitrust Regulations

[illegible]

THE AC on tra o r i a t d e f i n i t h e e m m a j o r m o d i f i c a t i o n . " d o e s , w e d e f i n e t h e r m o d i f i c a t i o n i n t h e p l a n a s c i n c e a n g e o g r a p h i c a n d t h e m e t h o d o f e r a t i o n a t s o m e w h e r e i n t h e r e l a t i o n s h i p b e t w e e n t h e p r o l l e m i n t t e d b y u s t o u s w h a t i n c s u r t h e m i s s a p p r o l l m d p a r n e t v i e m u i s t l y d . " U . S § 4 1 1 a ( ) ( 4 ) A § 1 1 a ( ) ( R e f l e c t t h e i n t e n t t h a t t h e r e c o n s t r u c t i o n p r o v i o s t h e C o n A P S D n r d o n a t t a i n e m i t t t i n a g r p e l r a i g e d o m f s t h c e o n s t o u n o d i i d n o c a d ' m i a g e m i t t f t a i n i g l u i n t d y e P e S D p r o g a a d a o f " m a j s o t r a t i s o o n u a r r ( c y e n " d e n e o n a n t e r a p i r r o g r a m t h e P A ' i s n p l e m e n t i n g r e g u l h a a t v i e o c h n s e a r d a d e s t f r a m e d e r o m h s o w n g e o a s o d u e t t e r m i n i n g w h e t a p a r t a c u l a r i n t x y i s " m i a n g b a t s o m a w c i y d l e e n t e d a " m a j o r m o d i f i c a t i o n t a h e i P o A n e g u l a p e c t i n t h e t e r m i n e a s m o w d h i e f t i h o s a r t i o n " m a j b o a r s e n d h e t t h h e r d i f i r c e a s t u i b o h n s c r o e f a m e s s a i b o o s p e c i f i e d r a t e s f i w n h i e n t g h h e m c r i e s s i e g n i ( f o g i r c a n l t d ' e n i n i a m m i o s u n t ) .

A p r o<sup>10</sup>cents tain u n d e r s i f i c a n t e g o u n N S R e d l i u (t a n d l y )  
i w o u l d s i m i l a r w o y p e f e m i s s i n o c n r s e a s e s i g n i f i c a s i n o c n r s e a s e

[illegible]

$74FR57479, (N50341.89077)$ .

<sup>8</sup> See, 49 C.F.R. 52.2 (21) (1978).

[illegible]

1. A "project" as such is not a change in method or data for an ongoing  
source F. 852.21(b)(52).

(d e t e r a n s i t n e p a d n a s i g n i n f e i n c i a s t i n o m ( d e a t s e r a n s i t n e p d S e e , g .  
4 C F R 5 2 . 2 1 ( a ) <sup>2</sup> T h e N S R a p p l i c a t i o n s p a r b o i c l e d u g r a p h i c h e t h e m i a s y i o n s  
N S R r e f o r m i z e d i a f f i r e d p a r a c o f f i c e k f i i n g w h e t h e m i a s y i o n s  
i n c r e a s e s f u r t h e r o r i g i n a l b e f o r e t h e w a t e r i t t h e m e  
w o u l d b e i g n i f i c a n t i n o m f a c t o r a j s o t r a t s o n a w h o l e .

T h e e g u l f a u t r i s t p r e s e n t h a p p e a r t p c o b a f o r a b e c u w l h a e t t a m e g r  
p r o p o s e d e u b t y l t s r e s i u a l s t i g n i e f m i i c s a i n t o r d e a p s e a n p d o n  
t h e y p e m i s s i n d i n v a t u b l e d n c l i u t d h e d o p p o s e d s e a t C . F R  
5 2 ( 2 ) ( 2 ) T ( h i e v s ) e ( f b f e r e c e d a d u r e e q s u b i e r e a d u r s e t h e N S R  
r e g u l a t h e p e r s e f u d i f e c h e e t n e t r s o d t h i " e b g a s a d t i e m e i l s s i o n s "  
a n t d h e o s t - c h a n g e t e l m a i l s o f f i c e x t i e s d t i n g u n e a m t d e i s f i e n e n t  
t h a m r e e q u i f e c h e e t n e t r s i n h i " e b i a n s e d t i e m e i l s s a i n d h p o " s t - c h a n g e  
" p o t e a r t h i f a n t r e e m i s s i n o n s .

A s r e l e a t h e a t h e N S R e g u l a t r i r e m s t a d i o b e l o w s :

§ 5 2 . P 2 r l e v e o n s t i g o n n i d f e i t e a r n o t a r i q u a t a i l o i n t y .

( a ) \* ( 1 \* ) \* \*

( 2 A ) p p l i c a t i o n i d t u r h e e s e . q u i r o e l m s i e s t a p o t r i d y h e  
c o n s t o d a n y e i n a n j s o t r a t s o n ( a d e f i i p e a d a g b i a ) p h  
o f h s i e s c t o i a o n p y ) o a e e k i s t i n g a m s q u a r e a

<sup>1</sup> T h r e e m i s s i o n i e s a s l e c a s t a n d u n f h e m i s s i o n a e t a t s r e i t d u h p a b t p c o j e a t ,  
c a l c p u a s t e a d C F R 5 2 ( 2 ) X 2 a ( a d n o y ) h i e c r a e d e e s r e a s t e u r a i l s s i l m e s o r  
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i n t e r p o s e t e a d n i r o u n i i c h a n t e m b r a n d u m c e e w i i d s e a g 2 y i d o l n t t i b n a u e e  
i m p o r o a t h e N S R a p p l i c a t i o n s s y a m p o e r c e e w a d e u g y b e n e e d a e d ,  
a p p r o p o r i a t e o n s i d e e m a i t s i s o n e o w i i a p d o j e d t h s e o n t e m p p e a m e d u s

<sup>2</sup> T h n i e m o r a c n i d u e m p a d v i s t h e e n d s R S i l a n d g u l a a t C F R 5 2 l . 2 a J h e t ) N S R  
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l p o n a a a h d e d u s a i n d e q u s r a e m t d e i e n t s e , r p s r e f e t o r a t t h i n d e m o r a a n l d s u n p l i e s  
t o h a s e a l p g o w s s i o n t s h a r d e w r e a e i n f , p c a t v i u e n i d e h f e s i S e b D a i f h e  
C A A n t d h E e P A o n a t t h e S i R e n g u l t a h a p t o t h o s e r n e a r i a t t a r i e n a e s n t i ( f s i e a g t i o n s  
C A 5 1 8 2 ( 4 C F R 2 1 1 ) a 5 t A , p p e s d . i l A x . 5 T h i n g h o r a d a n s a t d d r e s s p e e c i f i c  
m o d i f p c a t v i i a n A e o t s t h e E P A r e g f u o r r a t a b h a s r i e a n s t h t l s e p e c t o m m u n i c a t e  
a n E y P A i e w g a i n d i e g p o r f e h t p a r t e i v o i n s i o n s .

<sup>3</sup> l 0 0 T 2 E e P A s s a f e i d n a t h e a t v t b r e e d g u l g a o t v i e o n n i e a n j b S r p r o g 6 7 1 0 . 0 8 6  
( D e d 2 , 0 0 7 2 h ) e g e n e f g e e n s e t r a h e t a p l e o v a s h e n s ' N S R u R e f d r m

<sup>4</sup> " E m i s u n i i t e s f i n e d , i a n s a p e a r o r s v a a n t s o p a t a n d i o t w o u h l a d v l e o t e n t i a l  
t e m a n y e g u N S R e d l a n t i a n n c t l a u n d l e s c t r s i t e g a m i e l u a n t a y d n e g f i i p e a d a g r a p h  
( b X 3 1 ) h s i e s c t 4 i C F R 5 2 l . 2 b A ( 7 e ) m . i s u n i o n t h e i t a l l e u w n ' d a n ' e x i s t i i t g "  
w i a ' h n e u w n ' b d i n g f u r a t s h a e r n d e s i n t h e s t o w r i d e l ) r e o w s y a n u t h t a e s  
e x i s d l e e d s h 2 y e a f r r s t h d e a s e e m i s s i n o n s d e r a t e a t 5 2 . 2 1 ( A n ) ( e x ) i ( s i t ) i n g  
e m i s s i n o n s u n i t i s t a t a " t e a w s e a n o t a t 5 2 . 2 1 ( b ) ( 7 ) ( i i ) .

desig n at t e ad i o n n e c n l a s u s n i d e e r a b l i d e n ) ( A 1 p ( i i ) )  
o f h a e c t .

\* \* \* \*

( i T h ) e e q u i r o e f m h e m b g w r i a l m a p p l i a e c d o r w l a t h e e  
p r i n s e o p u l t e a s r a g ( r a a ) p ( h 2 s ) h i r i d u p d i h s i e s c t i o n .

\* \* \* \*

( b T ) h p e r o c e d u r l e c u ( l b a e t h i e n g g e a o t c o g n l s t w u h e t t i h e n r )  
a s i g n i e f m i i c s a s i n t o r r ( e i a t s e e i s s e d p i h p e r o c w e i s d s ) c u r  
d e p e u n p d o n h t e y p e f e m i s s u i n o i n t e s i m m o d i f a i c e d b , r t d i n g  
p a r a g ( r a a ) p ( h 2 s ) h i r i d u p d i h s i e s c t i o n o c e d u r l e c u l a t i n g  
( b e e f o e g i n a n c i t u g a r l s t r w u h e t t i h s e i r g n i n f e i t o n a i r s t i o n s  
i n c w e i a d s e a u t r h m e a j s o t r a t i s o n a i c e s e e c e n d p h e  
p r o c i e s s o n ) t a i n t h e e f i n i p t a i r o a n g ( p a p h ) t h e i c s t i o n .  
R e g a r d l i n s y s p h e c o n s t r o y e a n i a d j o n o r d i , f i r e a s t u i l d i s  
i f p t h o e p e a a s s g n i e f m i i c s a s i n t o r r a e a s s e i g n i n f e i t c a n t  
e m i s s i o n e a s e .

( a ) c t u a l - t o - p a r p o j l e i c d e l i o p t a i o t f y e h a a t r s i n v o l v e  
e x i s t i n g s i n d a t s s i g n i e f m i i c s a s i n t o r r e a s e e g u N S R e d  
p o l l i u s t r a o n j t e c d e u l h s e u n f h d e i f f e e d w t e h e n o j e c t e d  
a c t e u m a i l s s a i d e n f s i p e a d a g ( p a p ) h s i e s c t a i n t o p a s e l i n e  
a c t e u m a i l s s a d e n f s i p e a d a g ( r b a ) p ( h 2 s ) ( d i o i f ) h s i e s c t f i o o r n ) ,  
e a e k i s e m i i n g s i n d e n s i c a d s c e t e h s e s g n i a f m i o c u a n t h a f t o r  
p o l l i ( u a d s a n i p e a d a g r a p h h s ( e c ) t ( i 2 o n ) ) .

( a ) c t u a l - t o e f s p o r t e j t e h c a t s l n v o o n e t p a n e w o n  
e m i s s i o n s s i g n i e f m i i c s a s i n t o r r e a s e e g u N S R e d l u t a n t  
i p r o j e c t e d e u l h s e u n f h d e i f f e e d w t e h e n t e t n e t m i a t l  
( a d s e f i i p e a d a g b a p ( h ) s i e s c t f i o o r n ) a l e w m i s s u n d r t s  
f o l l o w i n g o f c h e m o p o j l e t d h a o s n e a l c i t r u e a l a e h e f s i r i e d s (   
i p a r a g ( p a p ) h o f h s i e s c t o i f d r e s e b e u f r o h p e s o e e a d a l s  
o e x c e t e h s e s g n i a f m i o c u a n t r h p a d l l ( u a d s e n f t i i p e a d a g r a p h  
( b ) o 2 s ) e s c t i o n ) .

( e [ R e s e r v e d ] [ I S J

<sup>1</sup> W h i n l o a d e s i g n a r e s d e w r h v a e d p e h a ( u e s ) 4 C F R 5 2 l . 2 a ) ( w 2 p ( o m u ) a g a t e d  
o f h 2 e 0 N S R e f o r u n e r i g p n a r h u l c g l a ( u e s ) e a d o l l o w s :

( e ) m i s s i e s p o r o j t e h c a t r s v o l l e d m i f t o a p r o f b e i t d c o n s t r u c t e d  
a n d p e r a t e d e l a m w t i t h c a u t s t i h e g n i s s u n d r s o s e c s l e a n U n i t  
d e s i g n m e n t i e s i n o m i s e e n e d c u r .

S e e F R 0 2 7 1 5 C e l e a n n o t o v d s h 2 e 0 N S R e f o r u n e s u b s e q u e d i n t h i n y l a a n f d u l  
v a c a t i o n . S o u r A t p p e f a t l r d e . C i r c a f i d h e e W o r E P A 4 , 1 B . 3 3 8 - ( 4 0 . C C i . r .

( H ) y b t e f d p r r o j t e h c a t t s v m l u v e t t i y p p e e s m i s s i n d A t s .  
 s i g n i e f m i i c s a i n t o r m e a r s e u N i S p e d l u s t r a n j e o c t e d r  
 i f h s e u m f t h e e m i s s i n o r e e s e a e s m i s s i n d u r s i t n h e e t h o d  
 s p e c i i p f a i e a l g ( r a e ) p ( h 2 s ) k i r o ( u b ) t h s i e s c a a p p l i w c i a t h l e  
 r e s p e a e m i s s i n d m e a c t y p e m i s s i n e i d s a d x c e e d s  
 t h s e i g n i a f m i o c u l a r t t h p a d l l ( u a s e r f t i i n p e a d a g ( b a ) p p l i i s  
 s e c t i o n ) .

4 O F R 5 2 . ( 2 1 ) ( 2 ) ( f . ) i v ) ( b

## The P A l s t e r p r o e t h e s R a p p l i c a b d i i s t i y o n s

B a s e n t h r e e c o n s i d e r m e r i e o r m o s l a s a l e n x s a m i m a f t t h i e o n  
 r e g u l a s a i w o h n o s l t h e P A n o w i n t e r t h p e r b s i s e f o n r i t n 4 O C F R 5  
 5 2 l a 2 ) ( 2 ) t ( h i r v o ( u g a ) s ( r j o ) v i t t a n t e m i s s i e o r s e l a n s e y s e f u r l a t m  
 g i v p e r n o p p s e e t e d e c o n s i d e e r a d c u d s i t d p g e t t h p e r o p o s e d  
 p r o y e d t s i u r a s t i g n i e f m i c s a i i h o c n r s e h a i n t e r p r i s t a t m i d t e h d e  
 p r i n t h i p t h e p l l a i m g o a g C e A A i n d i t h a G e n s g i r e s s h a p p n i S y R o  
 c h a n t g h e a s t c r a e a t s e a i l s s S b a n l e W o r E P A 4 , 1 B . a d 0 ( e m p h a s i s  
 a d d e d ) n . t t r d a h C e A A s d e f i r o i f t m i o o d n i f i i c a h t a i h o m r u e s b t e a c a u s a r k  
 b e t w e h e p h y s o i n o p e r a c h a n g i e s s - u i e . t e h . e p r o j a a d l y h a n i g e  
 e m i s s t h m a t s n s u e t h w e o r r d i s e c e s t a e c y o f u o r h f e u a l n d i r e e f c f t e c t  
 o f t h p e r o p o b a d i g t e s A e d c f o . r d a i t h y e l e y o , y t s f t h p e r o c f e o d r e t e r m i n i n g  
 w h e n i S e r r a y e d r i g g e E P A h , o g i a l e t e n d o t n w h e t e m e i r s a n a g n s  
 i n c r f e a d s t h e u s n e i t h a r p e a o f t h p e r o p e a t l w b e t e m e i r s a n a g n t s h e a m e  
 t i m e c r a e d a t s h e e n r i t h a r a e l s a e f t h p e r o j e c t .

T h e s e f t h p e r d s e o m f t h d e i f f e i r e n l a e u ( ' s c a ) s d d o ) 4 O C F R 5  
 5 2 . 2 1 ( m a k e s t a h r e d i f f e e d w a e n h i p t r ' o s j a c t e a n d i l s s i r o n s  
 p o t e t n e t m i ( a f l o l l t o h w e i m g l e f t h p e r n o j a e n d b a s e a l c i t t u a i l s ( p o r i s o r  
 t d h p e r o j m e a d t e ) i t a p e o r s i n t u i m b e e r r e p r e a s e r n o t j i e n g t e d a r s e g a t i v e  
 n u m b e r e p r e a s e r n o t j i e n g t e d a e s i e t h a e s t r e n v e a l t u l e s e f u r l o t r a u m m i n g "  
 t h " e d i f f e a r t e n e t a K i e n r t o n s i d a e s t a e t p i n b e n t e r n h e m i n s g s i m p r a s t  
 o f h p e r o j e c t .

S o m h e a v a e g u b a d i h c e a e p r o j i e n c v t o s b n i n g y n i t t h s e s w o m f h e  
 d i f f e c r o e u m l e d i e n r c b o d e r i e a n s i e s b i e o c n a s u h e p l i t o e a s l o t n e p a h e s  
 p o t e t n e t m i f a o l l l d w p e m o g t p e e - p b r a o s j e a l c i t t u a i l s s w i h o i n a s t e p u t a o l

2 0 0 T 5 h ) e . r e a a b f i t h e e g u l l a t h o r u e a l g t e t h e d e l u a n p i t o v i s a c d o d a ( n e s ) 4 O C F R 5  
 5 2 . 2 1 ( w a s s 2 r ) i f o r k e n s R e f o r u n d e a F R 3 2 5 2 2 5 ( 2 . 8 u n 3 2 , 0 0 A l ) a d f e o y t e d  
 t h d e . C i r c w a i c t a t s e r t a n i g u a g a ( u s ) 4 O C F R 5 2 l . 2 a ) ( a 2 ) t ( a d v ) g b e a r l y  
 p r o m u l g a O S a t d r u c k n a ( u s ) e a f i s e a m t t e h p a r t o v i d e d a m p a l p e r o j e c t l i v e s  
 b o a d x i s u n a i n a d C l u a n n i t h p e r o j e n d e s e s e r m y i u n n e r d t i h v e a l d u e t s e r u n s i i n n e g d  
 t l m e e t s p e c i i p f a i e a l g a a p d o ( h i s v e c ( f o o t ) h e x i s u n a i n t u g s i t n h e e t s p e c i i n f i e d  
 p a r a g a a p d o ( f i h s i e s ( c e f ) o t d e l e u a n n i S t e e F R 3 0 2 7 5 R 3 2 5 2 9 .

ze<sup>16</sup>Wh at thai rsg u m e n t i s h a n s R o c k s u l d a e t f i a d n m e s u n i a t s " a n y  
e m i s s i o n t h a t s t o r i b l e h e w c l o y n s t a r n u d h a e s x i s t / e e d s h s b y n e a f r r s o m  
t h e a s t e e m i s u n i f o i n p e r 4 C F R 5 2 . ( 2 ) 1 7 ( e r h p h a e d e a d h q a r  
n e w n " i t t h a s e a l c i t a u a i l s f o p o u n r s p o e e s e r r h i e m i i n s g i n o n t s h a a s t e  
w i r l e s f u r b i n e n i t i a l a c o d p e t a d u c h i s i c h n a d i z a e l r a o n " d t h e r e a f t e  
f o a r l o l t h p e u r r p s h a e d q u t a h l e n i p t o ' t s e h e m a 4 C F R 5 2 1 . b 2 ( 4 8 ) ( i i i )  
T h e r e f o d r o w i c h o g n a s t t o p e t m o a n " h i u n g i ( , t i d r e t e h a e s x i s d e d  
l e t s h a w y o e a s i n i d e o p e r a d e a d s h r e e s o u a p a r t p c a p e a p e r a i e n c e  
d e c r i e p a o s t e e n m t i i s a s t i o i a n s h " e s w m f h d e i f f e c r o e u b l e d e h e g a t i v e n u  
- i t f h p a r t o i j r e v d f l o i n e s i t a h n e s t a o l e o a n t o i r b o n l e s i r e s u i l a d e n g e a s e  
i n h u e n i p t o ' t s e t n e t m i a t l .

T h e p h r a s e m f t h d e i f f e d e a n s o d p p e a c r l a ( u s o f 4 C F R 5  
5 2 1 . a 2 ) ( 2 T ) h ( d i n i ) s a n d h f e a t h t a l t a ( u s ) p e a k s " e s w m f h e m i s s i o n s  
i n c r e l a e s d e E P , A ' s a i y a S e p t e 2 m 0 b 0 e o r t o i p e o p o s e d m t a k t h i g s  
" c h a l w l e e n t a n s m i s s i n o r a e t a n s e d i v e i n d i u s a u l i n o i a l a n e g a t i v e  
n u m b e r 7 e F " R 5 4 2 ( 4 9 e 1 p 4 2 , 0 0 V 0 h ) i t h e P A e o t t e a t y h i a t t a ' s r e a s o n a b l e  
t o o n c t l h a e t e u c a p r e r f o r o n j e t f t h r y g i p r o a j e e l t s h a d e a t y o  
i n d i t c h a t h e d u r r u e l n e t o u n l a t l l a s w o u t r e c r e d e a d f t r i o n n i s t s t h a  
a r e o p l e p e r t o j e s t i 2 o p f h e a l c u l a w a o n h b l a t s h a e P A r o p o s e d  
n e w e g u l l a n g u l y a g e i r e a d h a k d i e x p l t h e m i t t s s i o n s a w e d e s t r e a s e  
i n c r v e a u b l e a s c c o f n a t s e t d e f p o r r o j i e n o t s o v e n g s a n i d e a n i l t d s . .  
a 5 4 2 5 2 .

B a s e o e m o r t e n o r o u r g s h i d e f r h a e t i r o o o d f i e g r e g u l t a t e i o n s ,  
E P A i n t h a n e e g a i n f i v e e r l e n t h e g e d c e 0 0 6 d m f e a t c h t a h e r a s e  
" s u m d i f f t h i n e b n s d e e n t n h a ( u s ) e u s n w a r t o n h l e a d n . g i u a g a e ( u s ) e

<sup>16</sup> I w a o n t h i s t h a e P A r e v i s a u i l b y c a t h ' e s w m f h d e i f f e f r o a p r o e f ' b e a n t l y  
i n v o n l e a n s s i n o t h s n n t a u m t m o i m a g n i s s i n o n e l a s e s s u h o t a u l l i s t r o f b h r e a d i n g  
o f t h ' e s w m f h d e i f f e a s e h e c h e r " a s p l t p e r b j i e n c v t o s o n b x g s u t n i i h t e s a d i r h g e  
c o n c l t h a t k a i n o g o e m t i s d e o n a s a s e i p s o t p a e n t S i l e t h a e 3 t h O V E S M A l e t t e r  
a 5 A s w a p r e v i n o u t e l d e , r e o P A n g u e b s d o i n t h e a s o i t h N e S R e g u l r a e t f i l d e n t e e d  
M a r 3 0 H O V E N I S A t t e r .

<sup>17</sup> I n M a r 3 0 H O V E N I S A t t h e P A l s b a t t h e a d P A o u n l o n t a n e e d e d o v a s p e c i a l  
p r o v a s u n o i n g a t e i f o t h a r e e p l a c e m u e i l E P A a i d n t e t n e l d o w n p e r t a j i e d t h r e  
2 0 N 2 R e f R u n t h a l 3 0 H O V E N I S A t a t h B u t t h d e s o f t o l A b w e m p e r o v a s i o n ,  
r e p l a c e m u e u b l e e e r a e d o m i s s i n t o h s i t h a e t u a l - t t o e s t o a t p e p h l r y s a e a d  
t h a e t u a l - t o - p e a p j p e l c i t t e a d b i - b a e i f n g e t l r u e p i l r a g e t r i s t e m d t s f f e e e w e e n  
t h t w a p p l i t e b e n a r i e n g s a o u h e s e m e i r s d e o n a e a e c e s o f n a t s e t d e p

<sup>18</sup> T h i s g a i n f i v e e r e n c e e t p e r P A a i d o u p a t e i y e w t a h p i r s o v d i n d o a t h l " c p w r o n j e e t d t i n g , "  
7 F R a 5 4 2 4 9 t h t u s i a v t a s e c e s p a o y a c a s n e e n d m e 0 C F R 5 2 1 . ( 2 a ) ( 2 ) a ( i l l o v ) ( / )  
p r o e r e c s a s c i o n u f n o r y b g r i d j 7 e R a s 5 . 4 2 5 i n t h e P A d o n g e r s i l h e e r g s a t i v e  
i n f e t r b e e n a c r e r a t h a t g e d a , b o y o e o b t e l i i e s v e e c e s e a r a y h p e r z o e p 2 0 0 e d v b e i f o r r e  
p r o e r e c s a c c o s n a t n i e n o g n d u i o s t t e e d p f t h N e S R a p p l i c a n l a i l f y o b r y p e r i d j e c t s .  
H o w e v e r E P A i s o t t a k a i n t g a i t o m t i i s t h w i t h d h p a r v o j e c t n e o t f t h 2 e 0 g h e t b i f o r m e n t s  
p r o p o s e e m t a k t h e P n A g s t e i v a l l u w h e i t a n g e r v i o s t i h d e e x 4 C F R 5 2 1 . ( 2 a ) ( 2 ) s ( i v ) ( / )  
d e s i t r p a r b o l v e d d e i t i l a o n a i t i y s s u e .

in d i t h a n t i s d e o n a n s l e a c c o u n t l e a d u s p e c i f r i c v a i h d a y s  
t h " e s u n f h e m i s s i n o m e a e m i s s i n d i t s d e a l c u l f a t h e p e c i f i c  
i m p a t h p e r o p p o s e h a b s e t a s c e r w i a t i n s e p e a t t y p e n i i n t v o l v e d ,  
" u s t i m e t h s p e c i i f a e a l g ( r a a ) p ( h 2 s t ) h i i ( u g ) t h s i e s c a s o p l i c a b l e  
w i t h s p e a d m i s s i o p m p a d e d ) s a p h a i e v d b o f i n g e x i s t i  
a n d e w n i t t h a i s c o u n t d i a l g r o a u n i t y p e - h y p a s i i n h , i t d n t h  
e m i s s i o n s a s a g e d m i s s i n o m e a s a s t o b e t a k e m s i i n d e r a t i o

M o r e d h e i r s , d o h p y r s o v i i t h i r e g u l i a n t d i d c h a t h e r A r i g i n a l l y  
i n t e t h d e r t o e r a c s a c o n s i n e t l i n g v s e t d p o p r r o j e c t s i n v o l v i r  
t y p e s i n i t h e o n c l " u f d e i x n a g m . p . l s e e n t t e h r a c t e r i g b e p a d t l a u s e  
( p ) w t h i h c a l d e e t r i ( d f o r n e r l e a t a w d n e s t ) e l u a n n i t o v w a s i a o c n a t e d ,  
s e n e o t a b o i v e l , u s h a g a t n e s y t ' e s t h t a d m t p e r n o c v e i d w e h d e a p t e h c a p t o , s e d  
p r o i j e v d d l i v f e s e y r e e n s t i t h d e e , t e r m w i h n e a t t h i e s p e r o j e r d r i e s e  
t o m a d b e y " s u m m t i h n e g a l d e s e r m s i n t h e e t h s o p d e c i i p a e d g r a p h  
( a ) ( 2 o t h s i e s c f e o t h e e x i s u t n i a n t o l s i t h n e e t h s o p d e c i i p a e d g r a p h  
( a ) ( 2 o t h s i v e s c ( f e o t h e e l u a n n i ( t e . m ' p l a a s l e s i v e e t o u b s t i n e w t e  
u n i f b " r C l e a n a t n " d p a r a ( g a r ) a ( p 2 h ) f ( o i r p a ( d g a ' ) a ( p 2 h ) b ( y w a y f e ) , "  
p r o v a d l i i f n f g ' e e r x e a m t p h p e , i r ' e t m a S i i n n s c h e e v a l d u e e r s i f v e a d a l c u l a t i n  
t h " e s u n f h d e i f f e w r i e t n e c s e p " b o e h i s u t n i a n t h e w n c b s b l e d e g a t i v e  
n u m b t e h r e , l a u n s g i u d e g a ( u s p ' s u o m f t h e m i s s i n o c n r s e - a p s r e e s s f e o n t s  
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i n v b o e h i s a t n i d e a g n i t s .

T h e P A d o n s i t n t e t r h a x e i t s r t e i g n u g l a s t e q u s h a d e c r e e s e  
c r e d o e a f b e a s p a r b a l a n t a i t c i a e l r d e o r e o n s i a d e t r e d p h i e s o f e  
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1 R e g a t d i i i n g e o N S R e f o u r n h e P A x p r e s s l t j a n d e a p e q u i r e m e n t  
u n d e r i a s h o u r c e ' s p o s t - p r o j e c t p r o j e a e t n e f d r a c e t a u b a l e  
e m i s l s i i m o i n S a t a h o p n p . r h a p t h e v i b e a s u l g y b s t h e P A , u t t h a e g e n c y  
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N S R e f o u r n e ' s o t p r r e o a j e n c t i n a t l r a p a s e e s a p l y j e m i t e s l i o n s  
d e c r a s i s e e n e x c e p o h i o v s h e a r r e m i s s i o m i s s a s l e c w b a t t h e d  
p o t e t n e m i a t u n a i f t t h p e r o j e a c h a s e r e q u i o e n C e F 8 5 2 ( 2 4 1 )  
w o u c l o d n t t i a n p u p e l y .

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" p r o j a e d u n d s s i o n s " m e t h o d o l b o l y t e r a p c r k o i n i g s i e o n t s i n g e  
a n d n d c e r r d a i r o u m s h r a e n p c o e r s p , o a g - e m o s s e b o r s e e e 4 0 .  
C F 8 5 2 l . 2 b ) 5 ( 2 4 . 1 2 ) l . T ( h r o p s ( r e o ) . w s u d n d s o i n m p o r t s e a s n o b l i g a t i o n  
w i t h s p e m i s s i o m e a k a e c s c o u n t t e p i v t e m f h e P A h o n d t l  
t r p e a d j i e n d e a n a p s r e o s j d e c d e d a s e e a s e t r e p l y e q u t i h d i e n c g r e a s e s

be" cred a n d h e b e r e a s a b u l l e e t , h ' e a s w e t c h o n t e m p o d r e a c n e e a u s e s a c c o u n t s e t o p <sup>19</sup>

F i n a l l y p o t p a n o u t t h p a r t o f r e c s a c c o n s a n s e i n g a b b e d , i a c a l c u t h e a t o i n o n j u n i c a t i o n r t a t b e g g a n o n o n s t r u c t i o t h a e p p l i o n S i R l a p a r t p c o p a s b u t k a h e w n e r / o i p i e t s a e t l o f r p r o p o s i n g r l t i a h k i e s g a h e e P , A e c o g t r i a z e s n e r a l t h s e a u t r e e r , i t s e e s p o f n o d r e b l t a h s e a o p f e b s w h p r o s e b f o b u e n d e r s t a n d i n g t h s e o u r a c r e s e e t i r c u n S v R e y l t a t r e a r c i t z i e m o p p o s e j a v a t y h a t w o u s l e d p a i m a t t o e t p i r p o l j e h c a s e i t v h i l a t y i r e s e a s o n t a b n d e m s d a , i t u t e s i n p r g l o e s e b f o b e q u i u a n d e r r e t t h a i m t d g b h e g o s s t i o b i l r e c u n S v R e n t t h r o s u o g n e h o l a r y t i g r i o u p a f a r c g i v t h e e P A s o n s o i t n t e i r i n S R t r e g u l a a s t i i r o e n t s h a e g r e g t o y e c a l s u o d u e f r e e a s o n a b i y s r o b o f o i s r e i d n g p r o h e o a t d o l e y f m l e l c t a i o p t l i e v i e R A s s l p e t a l e t a h i i s s i u p e l a n n e d u p c o m e i n o g r o p r c a j g e g r t e g a t i o n . "

\* \* \* \*

T h e e P R e g i o n f a s h e s e l t d m i e s m o r a t n s d t u a n t i e t h i h i n u r i s d i c t i c F o a r n q u e s t o n o s r m i e m o r a p b a n o s r e A a d m a r W o e o i d n h O e f f i c e o A i Q r u a P i l a y a n n i S h t g a n d ( 9 0 9 4 ) 1 - 6 6 6 4 d . a n n a @ e p a . g o v .

<sup>19</sup> I t h s e e p t e 2 n o b o e 6 o t a i p e o p o s e d m a k e e P A a p r o p o s e d o p e t g u l l a a t n o g r u y a g e s p e c f o t i n e d r p o w e a t a s h e e r r h e d o n j e e t c t t i m a g n i " s s l e e r n a a s e e s r e d b t a b l e o t h e e w f o e a s a p a b a l e t m i a c t a S e l 7 e l . 5 4 R 2 A 2 i t a i t n e e P A p r o v i e d o p l a w l a y i o n i d o n s i s d u e a t e d q u i r t o n e e i n t h e e r e s s a a r r y r a a n t t e h d e g e m o y w e c o g n i h a z t e h s e r p r o v i i a k i r s t e i g n u g l s a e t r v e h s e o v i a c t e h p a r t s o j e m t e s d i o n s v o d i e l s c e l p a n e s t r a c k o c o m e r a t n a l e p o r t i n g a p e p q u i c a b o r d g e n t i e s d i i n c o r r e a s e d e s c u i n s e d f o o t l i n e , h e e P A s o w i t h d r t a h s e e p t e 2 n o b o e 6 o p a t s h a t i s n p e e n d f i u n g t h e r c o n s i d e r a w h e t a i n e v i o s f i h e a g u l t a e i c k e y i t r a b d o f i u d r e h a r i t y .

**To:** Keller, Peter[keller.peter@epa.gov]  
**From:** Svendsgaard, Dave  
**Sent:** Tue 3/13/2018 8:06:33 PM  
**Subject:** FW: Congratulations for getting the PEA memo out

Nice work!

**From:** Rao, Raj  
**Sent:** Tuesday, March 13, 2018 3:46 PM  
**To:** Keller, Peter <keller.peter@epa.gov>  
**Cc:** OAQPS AQPD NSRG <OAQPS\_AQPD\_NSRG@epa.gov>  
**Subject:** Congratulations for getting the PEA memo out

Peter, congrats to you for your painstaking work on drafting this memo and your umpteen reviews amidst trepidations of version control. First NSRG product getting out of the door. (DTE doesn't count, since the AO took it over). Looking forward to other products being issued soon. Keep up the hard work NSRG!!

Raj

Raj Rao, P.E.  
Group Leader, New Source Review Group,  
Air Quality Policy Division,  
Office of Air Quality Planning and Standards (MD-C504-03)  
US Environmental Protection Agency  
109 TW Alexander Drive  
Research Triangle Park, NC 27709  
919-541-5344  
919-541-5509 - Fax

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**To:** Gary McCutchen[g.mccutchen@rtpenv-nc.com]  
**From:** Keller, Peter  
**Sent:** Tue 4/3/2018 11:48:50 AM  
**Subject:** RE: Compliments

Well, there goes my cover ☐. J/K, thanks for the positive feedback. David has been great to work with and you're right, he would really enjoy the ANSR workshop! For some reason, I thought the Cargill matter had resolved itself, but must have been mistaken or it's a general issue that they still want addressed regardless. Anyway, we'd appreciate your input one way or the other on the AA agenda. I'm not the lead on that but you know we're a pretty small group.

Thanks again and I look forward to talking with you, or seeing you soon at the AWMA conference, assuming Raj approves that.

Peter

**From:** Gary McCutchen [mailto:g.mccutchen@rtpenv-nc.com]  
**Sent:** Monday, April 02, 2018 7:00 PM  
**To:** Keller, Peter <keller.peter@epa.gov>  
**Subject:** Compliments

Hi Peter,

I was on the phone with David Harlow and the Cargill folks today re the ambient air issue and it sounds like the NSR group is going to be dealing with it as part of an overall NSR improvement effort. That's good news as far as I'm concerned. He thought there might be a draft for comment in May. If you're drafting it, I'd enjoy the chance to discuss the pros and cons of a broader policy on ambient air than the immediate Cargill issue (two sources with same owner within the same secured perimeter).

But what I really wanted to tell you is that David was very complimentary of you. He says your rule drafts are excellent and he could hardly believe that they've been written by a non-attorney. I told him that was particularly high praise coming from an attorney. Of course, I bragged on you and your work with us, indicating that you are the only

person there that I know who has been on the flip side (trying to get a permit) and that you're knowledgeable in our compilation of NSR documents, so have a great background.

David was also very complimentary of me, Colin, Lynn and RTP Environmental in general—he's had several decades with Hunton and Williams and worked with Henry Nickel and other legends from that firm. And on top of all that, he's very personable and likeable. I'd say a good person to be Wehrum's Senior Counsel! I wish he could take our Advanced workshop—I have the feeling he'd love it.

## Gary McCutchen

RTP Environmental Associates, Inc.

304-A West Millbrook Road

Raleigh, NC 27609

Office: 919-845-1422 x37

Fax: 919-845-1424

Cell: 919-395-9596

E-mail: [g.mccutchen@rtpenv.com](mailto:g.mccutchen@rtpenv.com)

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**To:** Wayland, Richard[Wayland.Richard@epa.gov]; Fox, Tyler[Fox.Tyler@epa.gov]; Bridgers, George[Bridgers.George@epa.gov]  
**Cc:** Deroeck, Dan[Deroeck.Dan@epa.gov]  
**From:** Rao, Raj  
**Sent:** Wed 3/28/2018 4:24:58 PM  
**Subject:** NAAQS Coalition Meeting at 2 pm

Chet et al,

Chet I have a 2 pm with David H and hence Dan will attend for NSRG. Initially, I was thinking of Chuck participating but Dan is more familiar with the recent "Project Emissions Accounting" memo issued by the Administrator. We anticipate less number of sources triggering PSD and hence needing to do a PSD air quality analysis. Dan is also more familiar with the history of the RBLC (Statutory requirement to create a database for control requirements which created the database).

Raj

Raj Rao, P.E.  
Group Leader, New Source Review Group,  
Air Quality Policy Division,  
Office of Air Quality Planning and Standards (MD-C504-03)  
US Environmental Protection Agency  
109 TW Alexander Drive  
Research Triangle Park, NC 27709  
919-541-5344  
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**From:** Wayland, Richard  
**Sent:** Tuesday, March 27, 2018 6:04 PM  
**To:** Fox, Tyler <Fox.Tyler@epa.gov>; Bridgers, George <Bridgers.George@epa.gov>; Rao, Raj <Rao.Raj@epa.gov>  
**Subject:** FW: Who do you expect to be on the video conference from your end tomorrow?

FYI

Richard A. "Chet" Wayland | Director | Air Quality Assessment Division - Mail Code C304-02 | Office of Air Quality Planning & Standards | U.S. Environmental Protection Agency | Research Triangle Park, NC 27711 | Desk: 919-541-4603 | Cell: 919-606-0548 |

**From:** Stanko, Joseph [<mailto:jstanko@hunton.com>]

**Sent:** Tuesday, March 27, 2018 4:32 PM

**To:** Wayland, Richard <[Wayland.Richard@epa.gov](mailto:Wayland.Richard@epa.gov)>

**Subject:** RE: Who do you expect to be on the video conference from your end tomorrow?

Chet:

Thanks. Here are two documents that I think you have seen before but will be useful for you to have for tomorrow, one is the House (and now Omnibus) Approps language, and the other is our draft FAQ. Also, from our end, the attendees will be :

- Cathe Kalisz, American Petroleum Institute
- Ryan Gesser, Georgia Pacific
- Eric Hutchins, Hunton & Williams
- Cindy Langworthy, Hunton & Williams
- Joe Stanko, Hunton & Williams
- Rob Kaufmann, Koch Industries
- Phillip Wakelyn, Texas Cotton Ginners Association

Regards,

Joe

**HUNTON & WILLIAMS** Joseph Stanko  
Partner

ED\_001770A\_00016045

[jstanko@hunton.com](mailto:jstanko@hunton.com)  
p 202.955.1529

[bio](#) | [vCard](#)

Hunton & Williams LLP  
2200 Pennsylvania Avenue, NW  
Washington, DC 20037

[hunton.com](http://hunton.com)

**From:** Wayland, Richard [<mailto:Wayland.Richard@epa.gov>]  
**Sent:** Tuesday, March 27, 2018 3:02 PM  
**To:** Stanko, Joseph  
**Subject:** Re: Who do you expect to be on the video conference from your end tomorrow?

Me, Tyler Fox, George Bridgers, Raj Rao and maybe a few others but those for sure.

Chet

Richard A. "Chet" Wayland

Sent from my iPhone

On Mar 27, 2018, at 2:54 PM, Stanko, Joseph <[jstanko@hunton.com](mailto:jstanko@hunton.com)> wrote:

Thanks

Joe

<image001.jpg>**Joseph Stanko**

p 202.955.1529

[bio](#) | [vCard](#)

Hunton & Williams LLP  
2200 Pennsylvania Avenue, NW  
Washington, DC 20037

[hunton.com](#)

**To:** Deroeck, Dan[Deroeck.Dan@epa.gov]  
**From:** Rao, Raj  
**Sent:** Wed 3/28/2018 4:27:34 PM  
**Subject:** FW: Who do you expect to be on the video conference from your end tomorrow?  
[FY 18 House Permitting Report Language-c-c.pdf](#)  
[NIC Photochemical FAQs \(1-3-18\) 66853535 9-c-c.docx](#)

For the 2 pm in C335 I

Raj Rao, P.E.  
Group Leader, New Source Review Group,  
Air Quality Policy Division,  
Office of Air Quality Planning and Standards (MD-C504-03)  
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- Eric Hutchins, Hunton & Williams
- Cindy Langworthy, Hunton & Williams
- Joe Stanko, Hunton & Williams
- Rob Kaufmann, Koch Industries
- Phillip Wakelyn, Texas Cotton Ginners Association

Regards,

Joe

**HUNTON & WILLIAMS** **Joseph Stanko**

Partner

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Richard A. "Chet" Wayland

Sent from my iPhone

On Mar 27, 2018, at 2:54 PM, Stanko, Joseph <[jstanko@hunton.com](mailto:jstanko@hunton.com)> wrote:

Thanks

Joe

<image001.jpg>**Joseph Stanko**

Partner

[jstanko@hunton.com](mailto:jstanko@hunton.com)  
p 202.955.1529

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Washington, DC 20037

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FREQUENTLY ASKED QUESTIONS FOR SINGLE SOURCE MODELING OF OZONE AND PM<sub>2.5</sub>

1. **Question:** How should a project's "proposed emissions increase" be calculated for the basis of comparison of MERPs developed using the MERPs guidance?

**Answer:** For a new major source, potential emissions should be the basis of comparison with the MERPs. For a major modification at an existing major source, the "Step 1 emissions increase" based on the difference between projected actual emissions and baseline actual emissions from existing emissions units and potential emissions from new emissions units, as applicable, should be the basis for comparison with the MERPs. Only the actual emissions changes associated with a project at an existing major source should be evaluated because the existing source emissions (including those that might be considered in an emissions netting analysis) would already have been included in the background ambient air quality values.

2. **Question:** Does EPA intend to primarily rely on the Tier 1 approach for permit modeling for ozone and PM<sub>2.5</sub>?

**Answer:** Yes, EPA has stated in the revised Appendix W that "a Tier 1 demonstration tool will be sufficient for most sources to satisfy their compliance demonstration."<sup>1</sup> Our MERP guidance, issued December 2, 2016,<sup>2</sup> and a subsequent webinar on July 27, 2017,<sup>3</sup> provide additional information for how a Tier 1 analysis can be performed. However, we do not intend to preclude outright other approaches for permit modeling.

3. **Question:** For a Tier 1 analysis, suppose that my proposed source location does not coincide with one of the locations shown by EPA in Table A-1 of the December 2, 2016 MERP guidance. Can I use the data from the nearest modeled location?

**Answer:** In many cases, that approach will work, but it will depend upon whether the physical and chemical environments are similar between the proposed source location and the modeled location. In the event that the MERPs are similar for modeled locations surrounding the proposed source location, the selection of the nearest location at which MERPs have been determined should be acceptable. If previously-determined MERPs are significantly different for nearby locations, then some additional discussion to justify the selected location will be needed.

4. **Question:** To simplify the selection of a Tier 1 MERP, can I use the MERP value from Table

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<sup>1</sup> 82 FR 5193.

<sup>2</sup> EPA, 2016. Guidance on the use of modeled emission rates for precursors (MERPs) as a tier 1 demonstration tool for permit related programs. Available at [https://www3.epa.gov/ttn/scram/guidance/guide/EPA454\\_R\\_16\\_006.pdf](https://www3.epa.gov/ttn/scram/guidance/guide/EPA454_R_16_006.pdf).

<sup>3</sup> EPA, 2017. Tier 1 and 2 Demonstrations for Ozone and PM<sub>2.5</sub> under the PSD Permitting Program. Webinar presented on July 25, 2017. [https://www3.epa.gov/ttn/scram/appendix\\_w/2016/Appendix\\_W-Section5-WebinarPresentation.pdf](https://www3.epa.gov/ttn/scram/appendix_w/2016/Appendix_W-Section5-WebinarPresentation.pdf).

7.1 of the Guidance applicable to the region of the continental US (eastern, central, western) in which the proposed source is located, since that value is the most constraining MERP for each precursor pollutant in that region?

**Answer:** Yes, that approach is conservative and acceptable. The information from Table 7.1 (as amended) in the MERP guidance is provided here.

**Table 7.1 Most Conservative (Lowest) Illustrative MERP Values (tons per year) by Precursor, Pollutant and Region.** Note: illustrative MERP values are derived based on EPA modeling (as described in section 4) and critical air quality thresholds (as described in Section 5).

Precursor	Area	8-hr O3	Daily PM	Annual PM
NOX	CUS	126	1,693	5,496
	EUS	170	2,295	10,144
	WUS	184	1,075	3,184
SO2	CUS		238	839
	EUS		628	4,013
	WUS		210	2,289
VOC	CUS	948		
	EUS	1,159		
	WUS	1,049		

5. **Question:** If the proposed new source emission rates for ozone or PM2.5 precursors are above the MERPs, can a Tier 1 approach still be used for the modeling analysis?

**Answer:** Yes, as long as the conservative nature of the Tier 1 modeling approach is followed. That approach includes using the highest applicable MERP value for the source location, as noted in the MERP guidance, and adding impacts from all applicable precursors.

An example of this Tier 1 approach for one of the precursors is as follows: Suppose that a previously conducted representative EPA modeling exercise has established that a new NOx source with an emission rate of 400 tons per year will lead to a peak ozone concentration of 1 ppb. For a proposed project with a NOx increase of 1,000 tons per year, the applicant may use the existing EPA modeling rather than conduct new Tier 2 modeling. The project impact can be estimated through scaling of the Tier 1 modeling as  $1000/400 \times 1$  ppb, or 2.5 ppb ozone. Assume that a similar exercise shows that the project's VOC emissions will result in a 0.5 ppb ozone impact, for a total project impact of 3.0 ppb. For the example noted above, suppose that the highest monitored design value is 60 ppb. Then the total cumulative impact would be 63 ppb, which is below the 70 ppb NAAQS. This assessment is very conservative because the highest (not the design ranking, which is the 4th highest) modeled project impact for each precursor is added to the highest design background as if they all occur at the same time and place. It is important to realize that applying a Tier 1 screening-level approach would not preclude the option of a more refined Tier 2 model estimate in the event that the results of the conservative screening modeling approach exceeds the ambient air quality objectives, such as NAAQS or, if applicable, PSD increments. A more refined Tier 2 approach would also account for temporal and spatial variations of the proposed source impacts, timing of the multiple precursor impacts, and background concentrations.

6. **Question:** If refined photochemical grid modeling, done in a manner similar to EPA's

generic source modeling for the MERP guidance, exists for other source types and locations, can that modeling be used for Tier 1 analyses?

**Answer:** Yes, such modeling can be submitted to the permitting authority for review and approval. This modeling could also be provided to supplement EPA's national database for future Tier 1 modeling applications.

7. **Question:** Is EPA able to provide a list (and associated computer files) of readily-available and pre-approved modeling platforms for Tier 2 analysis, as well as examples of previous Tier 1 analyses to guide future Tier 1 analysis?

**Answer:** EPA issued a Clarification Memorandum on August 4, 2017, that addresses many of the elements needed for approval of a Tier 2 modeling approach.<sup>4</sup> EPA understands that a key issue is the availability of a modeling platform that includes the emissions inventory, the meteorological database, and the general grid system to be used for the plume transport and dispersion. EPA also realizes that access to previous Tier 1 analyses would aid future Tier 1 analysis. EPA is actively working with regional groups and states to obtain pre-approval for available platforms with readily-available access to the needed computer files, as well as other information aiding both Tiers of analysis. EPA expects to provide a web site with information on these modeling platforms later in 2017.

8. **Question:** EPA's Clarification Memorandum establishes the adequacy of the CAMx and CMAQ photochemical grid models for use in PSD compliance demonstrations. What are the "fit for purpose" requirements for other types of models such as the SCICHEM reactive puff model?

**Answer:** The discussion for each model "pre-approved" by EPA involves five specific elements for use of a non-guideline model, which are listed below. The degree of documentation for other models such as SCICHEM would need to include the same elements, as outline in Section 3.2.2 of Appendix W:

- 1) The model or technique has received a scientific peer review (peer-reviewed papers are cited);
- 2) The model or technique can be demonstrated to be applicable to the problem on a theoretical basis (this is discussed in the context of what the peer-reviewed papers state);
- 3) The databases which are necessary to perform the analysis are available and adequate (this involves a discussion of available modeling platforms);
- 4) Appropriate performance evaluations of the model or technique have shown that the model or technique is not inappropriately biased for regulatory

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<sup>4</sup> Memorandum from Tyler Fox, Group Leader, Air Quality Modeling Group, to EPA Regional Modeling Contacts (Aug. 4, 2017), [https://www3.epa.gov/ttn/scram/guidance/clarification/20170804-Photochemical\\_Grid\\_Model\\_Clarification\\_Memo.pdf](https://www3.epa.gov/ttn/scram/guidance/clarification/20170804-Photochemical_Grid_Model_Clarification_Memo.pdf).

application (a review of available evaluation studies); and

5) A protocol on methods and procedures to be followed has been established (this section lists the expected content of a modeling protocol).